

***United States Court of Appeals
for the Second Circuit***



**PETITIONER'S
BRIEF**

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73-2365
*06-2884

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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In re, UNITED STATES OF AMERICA, :
Petitioner, :

-----x

SOCIALIST WORKERS PARTY, et al., :
Plaintiffs-Appellees, :

- v - :

THE ATTORNEY GENERAL, et al., :
Defendants-Appellants. :

-----x

DOCKET NO.

77-8271

77-3041

ON MANDAMUS AND APPEAL FROM THE
UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF NEW YORK

PETITION AND BRIEF OF THE
UNITED STATES OF AMERICA

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- v - :

THE ATTORNEY GENERAL, et al., :

Defendants-Appellants. :

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PETITION AND BRIEF OF THE UNITED STATES
OF AMERICA

Preliminary Statement

On June 7, 1977, the Honorable Thomas P. Griesa, United States District Judge for the Southern District of New York, entered an order directing the Government to release to counsel for plaintiffs the voluminous raw files maintained by the Federal Bureau of Investigation ("FBI") on 18 individuals who have acted as informants or confidential

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sources for the FBI and whose identity as informants has never before been disclosed.* The order, which was sealed, followed a closed hearing attended by counsel for the plaintiffs, a representative of plaintiff organizations and counsel for the Government. Counsel for the plaintiffs were instructed not to disclose the identity of the informants to their clients and all present were directed not to disclose the existence of the Court's order. The Court's order is contained in the sealed minutes of the closed hearing (33a-61a).**

The District Judge stated that his action was the first step in a disclosure procedure which might culminate in the revelation, at least to plaintiffs' counsel and possibly to the plaintiffs themselves, of the identities of 1,300 individuals who have provided the FBI with information concerning plaintiffs and other organizations and individuals under a pledge of confidentiality.

The Government respectfully petitions this Court for a writ of mandamus directing the District Court to withdraw its order as an unwarranted abrogation of the informant privilege. The Government also appeals from the order pursuant to 28 U.S.C. § 1291.

* The Court also ordered the Government to make available to plaintiffs' counsel detailed summaries of the 18 informant files prepared by the Government at the Court's request to aid it in adjudicating the Government's claims of informant privilege with respect to the 18 individuals involved.

** References are to pages in the Appendix.

The instant case was previously before this Court on an interlocutory appeal by the Government. Socialist Workers Party v. Attorney General of the United States, 510 F.2d 253 (2d Cir. 1974), rev'g, 387 F. Supp. 747 (S.D.N.Y.).* On that appeal the Court, in a per curiam opinion, reversed as an abuse of discretion the District Judge's issuance of a preliminary injunction, which, among other things, would have, as in the case of the instant order, resulted in the unjustified disclosure of the identity of a sizable number of informants.

QUESTION PRESENTED

Whether the District Court abused its discretion in directing release to plaintiffs' counsel of eighteen confidential informants' identities and files in a civil action against the Government.

Statement of Facts

The plaintiffs are the Socialist Workers Party ("SWP"), its youth arm, the Young Socialist Alliance ("YSA"), and various individual members of these organizations.** The defendants are the United States of America, the Attorney General, the Director of the FBI, the heads of numerous

* Justice Marshall denied plaintiffs' application for a stay of the Court of Appeals order in an opinion reported at 419 U.S. 1314 (1974).

** The SWP was founded in 1938 and constitutes the principal Trotskyist organization in the United States. Its youth affiliate the YSA was formed in 1960. Both the SWP and YSA have membership of approximately 1000 each and are affiliated with the Fourth International, a confederation of Marxist-Leninist parties that was organized in 1938 by Trotsky himself.

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other Government agencies and various individuals.*

A. Summary of the Action to Date

The original Complaint (398a) in this action was filed on July 18, 1973, and sought damages and injunctive relief for claims arising under Articles 1 and 2 and the First, Fourth and Fifth Amendments of the United States Constitution, as well as 18 U.S.C. §2520 and 42 U.S.C. § 1985(3). While numerous public officials were named as defendants in their official capacities and some in their individual capacities, the United States was not named as a defendant.

The Complaint alleged that the public officials had agreed and adhered to a common plan of harrassment, employment discrimination and other improper practices against plaintiffs since 1948, allegedly carried out by electronic surveillance, unauthorized opening and monitoring of mail, burglary and by other illegal means.

* Plaintiffs' Second Amended Complaint, (456a) filed on October 8, 1976, names the following defendants:

Attorney General of The United States, Secretary of the Treasury, Secretary of Defense, Postmaster General, Secretary of the Army, Director of the Federal Bureau of Investigation, Director of Central Intelligence, Director of Secret Service, Director of Defense Intelligence Agency, Director of National Security Agency, Director of Alcohol, Tobacco and Firearms Division (U.S. Treasury), Director of Selective Service System, Civil Service Commissioners, the President of the United States, Richard M. Nixon, John Mitchell, John W. Dean III, Arthur J. Greene, Jr., George P. Baxtrum, Jr., John F. Malone, Unknown Agents of the United States Government, and the United States of America.

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The purpose of these activities was allegedly to deny plaintiffs equal protection of the laws, equal privileges and immunities under the law, the right to participate in the electoral process and the right of free speech and association. Plaintiffs alleged that their right to participate in federal, state and local electoral processes prior to and during 1971 and 1973 and thereafter was denied by the public officials in that their activities deterred members and potential supporters from joining and supporting the SWP and its candidates. Plaintiffs further alleged that interviews and disclosure of members' party affiliations deprived them of their rights to privacy and anonymity in their association with a minority political party, as well as equal protection under the law. The public officials were charged with conspiring with the individual defendants to violate 42 U.S.C. § 1985(3) by depriving plaintiffs of equal protection, equal privileges and immunities, by preventing plaintiffs from participating in lawful political activity and by damaging their reputations in interviews with landlords and employers.

Plaintiffs' First Amended Complaint, (426a), filed on May 12, 1976, for the first time named the United States as a defendant and for the first time alleged jurisdiction under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671 et seq.* The Second Amended Complaint, filed on

* The Amended Complaint also alleged jurisdiction under 42 U.S.C. §§ 1983 and 1985(1) for the first time.

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October 8, 1976, contained a new general prayer for damages against the United States and added a new claim for relief which is not here relevant.

Plaintiffs' Second Amended Complaint is a broad-based attack on the Government's intelligence gathering and investigative capabilities, in which plaintiffs seek both injunctive relief and monetary damages against the United States. The injunctive relief sought includes a flat prohibition against any further Governmental investigation of the plaintiffs, the public disclosure of the identity of all individuals who have provided information to the Government regarding plaintiffs' activities, and the release to plaintiffs, for purposes of destruction, of all Government files regarding the SWP and YSA.* The United States is alleged to be liable for compensatory damages under the Federal Tort Claims Act, 28 U.S.C. § 2671 et seq., for certain purportedly "negligent and wrongful acts of employees of the United States government while acting within the scope of their employment" (486a). In total, more than \$40,000,000 in compensatory and punitive damages are sought from the defendants.

* The Attorney General terminated the FBI's investigation of the plaintiff organizations in September 1976 under his April 1976 Guidelines for Domestic Security Investigations. See Deposition of Clarence Kelley held on November 31, 1976 at 38-60 (1166a-1207a).

The plaintiffs' discovery of the defendants to date has been broad in scope and voluminous in content. Approximately 70,000 documents have been turned over to plaintiffs by various governmental agencies, approximately 53,000 of which have been produced by the FBI. The plaintiffs have also served numerous sets of interrogatories on various agency defendants, nine of which were directed to the FBI. In addition, plaintiffs have taken 18 depositions and have noticed two additional depositions for July of this year. Twelve of the deponents have been FBI employees, including Clarence Kelley, the Director of the FBI.

The information furnished by the FBI has indicated that the FBI's investigation of the SWP began in October 1940 and continued until September 9, 1976, when the Attorney General of the United States ordered its termination. The initial investigation was premised upon the criminal provisions of Title 1 of the Alien Registration Act of 1940, 54 Statutes at Large 670, which made advocating the overthrow of any government in the United States by force or violence, and conspiracy to commit the same, a criminal violation. Thereafter there were various additional criminal bases for the investigation, with particular emphasis

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upon 18 U.S.C. §§ 2383-85 (Rebellion, Seditious conspiracy, Advocating overthrow of Government) and the Voorhis Act, 18 U.S.C. 2386, requiring the registration of certain foreign organizations (985a-988a).*

The discovery has revealed that in its investigation of the SWP and the YSA the FBI utilized various investigative techniques. The use of informants, including confidential sources, and interviews were by far the most widely utilized techniques. On a limited basis the FBI also used physical and photographic surveillance, and between 1960 and 1963 there was a limited amount of electronic surveillance. On one occasion there was a mail cover.** The FBI also engaged in 92 surreptitious entries of the SWP and YSA headquarters in New York between 1960 and 1966. Finally, discovery has also revealed that from 1961 to 1969 the SWP and YSA were

* In fact SWP leaders were convicted for violation of the Smith Act, 18 U.S.C. § 2385. Dunne v. United States, 138 F.2d 137 (8th Cir. 1943), cert. denied, 320 U.S. 790 (1943).

** A mail cover involves the copying of the return addresses of all mail sent to a particular addressee.

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subjects of the FBI's now defunct Counterintelligence Program (COINTELPRO) which was an attempt to adversely affect the functioning of the SWP and YSA.*

In an effort to focus and define the issues in this case the Government has also conducted extensive discovery of the plaintiffs by interrogatories and depositions. As concerns informant activity, this discovery reveals that the plaintiffs were aware of the presence of informants in their organizations as early as the 1960's and believed at that time that informants were being utilized to harm the organizations (551a-510a). Discovery has also disclosed that plaintiffs claim to be unable to point to any specific instance where informants harmed the organizations** and, instead, simply claim that the presence of informants caused the SWP and YSA to lose some \$15,000,000 (777a, 781a, 782a, 783a).***

* The FBI sometimes referred to this program as the SWP Disruption Program.

** In essence plaintiffs claim that they cannot know how they were purportedly harmed until after informant files are disclosed to them (782a).

*** The Government's discovery has also focused on the plaintiffs' relationship with the Fourth International. That discovery has confirmed that the Fourth International has been involved in significant acts of terrorism and revolutionary violence and that five key figures in the SWP who are named plaintiffs here (Barnes, Waters, Hansen, Camejo and Sheppard) are also members of the interim governing body of the Fourth International known as the United Secretariat (854a-984a).

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B. Allegations Concerning the FBI's Use
of Informants

Plaintiffs' Second Amended Complaint alleges that the FBI caused informants secretly to infiltrate the SWP and YSA for the purpose of "spying upon bona fide members and supporters, of interfering with lawful campaigning and organizing, and of attempting to control and direct the political activities of the SWP and the YSA" (463a). They further allege that many informants actively participated in the formulation of SWP and YSA programs and policy, including the selection of political candidates and party leaders (463a).

* In an administrative claim under the Federal Tort Claims Act, 28 U.S.C. § 2675, dated October 28, 1976, which was after the filing of the Second Amended Complaint, plaintiffs also charged that on hundreds of occasions FBI informants entered SWP and YSA premises without authority and "removed documents, information and other things" (1239a).

C. Plaintiffs' Discovery Concerning Informants

As part of their pretrial discovery, plaintiffs filed on April 26, 1976, a second set of interrogatories addressed to various governmental agencies which posed a series of questions concerning informants. The interrogatories defined an informant as any individual who, on more than one occasion, had provided information or documents regarding the plaintiff organizations and their members to one or more of the agencies. Pursuant to Court direction, the interrogatories covered the period from 1960 to the present. See Transcript of May 5, 1976 at 280.

Among other things, the interrogatories asked, as to each informant, how long he or she had acted as an informant, whether he or she was or had been a member of SWP or YSA and, if so, the positions he or she held in SWP or YSA, whether the informant had turned over SWP or YSA documents to the answering agency and, if so, what documents and how had they been obtained, what instructions, if any, were given to the informant regarding the informant's participation in SWP and YSA activities, and whether the informant had been directed or encouraged to gain direction or control over SWP or YSA activities.

Because of the number of informants used by the FBI and the volume of the supporting files, agents in each

of the FBI field offices where the informant files were located were assigned to review the informant files* in their respective offices and prepare answers to the interrogatories based on their review of the files.

In June 1976, the Government served separate answers relating to each of the approximately 1,300 individuals who had provided information concerning plaintiffs to the FBI on a confidential basis on at least two occasions since 1960. Although the informant subject of each answer was identified only by an arbitrary code number in order to protect his or her anonymity and the answers were likewise drafted to avoid inadvertent disclosure of the identity of informants, the two file drawers of answers and copies of documents referred to in the answers nevertheless provided plaintiffs with a wealth of information concerning informant activities.

Of the 1,300 informants covered, the answers disclosed that approximately 300 were for some period of time -- ranging from a few weeks to a number of years -- members of one or both of the plaintiff organizations.

* An informant file, as maintained by the FBI, consists of two basic parts, an administrative section and an investigative section. The administrative section contains information concerning the informant's relationship with the FBI, how the informant was recruited, how much, if anything, the informant was paid and FBI evaluations of the informant's activities. The investigative section contains interviews with or reports by the informant and copies of documents obtained from the informant.

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On the average, from 1960 to 1976 there were approximately 38 FBI informants who were members of SWP and 34 who were members of YSA (616a).* For that period the largest number of informants in the SWP in any one year was 54 in 1961 and the smallest number was 20 in 1976. For the YSA, the largest number of informants in one year was 80 in 1972 and the smallest number was 6 in 1960. In 1975 the last full year of the investigation, there were 20 FBI informants with SWP memberships and 57 belonged to the YSA, accounting for approximately 1% of the SWP's claimed total membership and approximately 5% of YSA's claimed total membership (616a, 774a-775a).**

* These figures do not take into account the fact that a certain number of informants held membership in both SWP and YSA.

** According to the party's constitution, the highest governing body of the SWP is its National Convention composed of delegates from each branch. Between conventions power is vested in the National Committee, which "directs all work of the Party." The National Committee is composed of 28 members with 22 alternates and is elected by the National Convention (491a-511a). The YSA, SWP's youth affiliate, is organized along similar lines.

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During the 17 year period covered by the interrogatory answers, 60 informants served on national and local committees of the SWP and YSA or held "organizer" positions in local branches (612a-614a). None, however, ever occupied any major national office in either the SWP or YSA (613a).

Subsequent to the service of the interrogatory answers, in July 1976, a member informant named Timothy Redfearn was arrested for burglarizing an SWP-YSA office in Denver, Colorado. Upon learning of Redfearn's arrest and of his informant status with the FBI, plaintiffs noticed his deposition and requested production of his informant file. While the deposition was never taken because of Redfearn's refusal to testify, Redfearn's informant file was released to plaintiffs. The file disclosed that in 1973 Redfearn had removed documents from the headquarters of the Denver chapters of SWP and YSA, as well as the home of a party member, and delivered them to the FBI field office there. The interrogatory answers relating to Redfearn which had been prepared in the Denver field office, however, failed to

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disclose this fact, as well as a description of all SWP-YSA documents obtained from Redfearn, although clearly called for.

On August 3, 1976, relying on the misrepresentations contained in the Redfearn interrogatory answers, plaintiffs renewed an earlier request for the production of the FBI's files of six other informants whose identities they claimed to have discovered (341a-348a).^{*} After the Government satisfied itself that each had in fact disclosed his informant relationship with the FBI and that, accordingly there was no basis for maintaining further confidentiality, the files for the six were voluntarily furnished to plaintiffs. Although plaintiffs received five additional file drawers of materials concerning these informants, none of the six has been deposed concerning the information revealed in his file.^{**} Moreover, plaintiffs have not called to the district court's attention any material discrepancies between

^{*} The six, who were identified in the public record below, are John Neal, John Hollowell, Jim Nilson, Orrie Norton, Steve Cooper and Rodney Hertz.

^{**} Three of the six were deposed briefly before their files were produced, and plaintiffs have not sought to redepose any of them.

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the interrogatory answers covering these six former informants and the files from which the answers were prepared.

D. The Motion to Compel the Identification of 19 FBI Informants

On August 25, 1976 plaintiffs moved for an order directing the FBI to disclose the identity of 19 informants that plaintiffs designated by the code numbers used in the interrogatory answers and to produce all documents relating to them.* Plaintiffs alleged that they had selected the 19, based on an analysis of the interrogatory answers as "a representative cross-section of past and present informants who played important or typical roles with respect to the [SWP and YSA]. . . ." Plaintiffs, however, were careful to note that this limited application was made without prejudice to "further subsequent demands by plaintiffs for examination of the files of all 1,600 [sic] informants." Memorandum in Support of Plaintiffs' Interrogatories to the Director of the Federal Bureau of Investigation (Sixth Set) and Requests for Production of Documents, filed August 24, 1976, at 2, 3.

* The Government withdrew its objection as to one of the informants because the confidentiality of his role as an informant had been previously compromised by the informant.

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The Government opposed the motion to compel on the ground that the information sought was protected from disclosure by the informant privilege. The Government contended that the plaintiffs had failed to make a showing that their need for the informants' identities and files outweighed the public interest in the flow of information from confidential sources to law enforcement agencies, which can only be maintained by assuring informants that they will not be exposed to those who would harm or embarrass them. In this regard, the Government pointed out that a large scale revelation of the identities of informants in the instant case would likely be viewed by informants in other investigations as a signal that the confidentiality of their relationship with the Government could no longer be protected, thus causing them out of fear to cease providing information.

The Government raised several fundamental legal arguments concerning plaintiffs' claim arising from alleged informant activity: (i) that plaintiffs failed to state a

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damage claim upon which relief could be granted;* (ii) that their Federal Tort Claims Act claims were barred by the applicable statute of limitations, 28 U.S.C. § 2401(b), in that they failed to file an administrative claim with the FBI within two years after they knew of their claim; and (iii) that their injunctive claim for a cessation of informant activity in their organizations had been mooted by the Attorney General's termination of the SWP-YSA investigation. As a result, the Government argued, the plaintiffs' need for the informants' identities and files was all but non-existent. The Government further argued that what residual need plaintiffs might have for additional information concerning informants could be satisfied by alternative methods of discovery such as additional interrogatories and requests to admit -- all of which would stop far short of disclosing informants' identities.

* The District Court treated this aspect of the Government's opposition to plaintiffs' motion to compel as a motion to dismiss:

The Government contends that discovery of the informant files is unnecessary because the voluntary cessation of the informant program precludes the need for injunctive relief, and because there are various legal barriers to any recovery of damages, particularly under the Federal Tort Claims Act. On the latter point, I have previously denied a motion to dismiss the claims under the Federal Tort Claims Act, on the ground that the legal issues could not be properly determined without the development of a factual record. I adhere to that ruling (47a).

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The FBI's view that its ability to gather information for law enforcement purposes would be severely damaged by the disclosure of informant identities in this case was documented in the affidavit of James P. Adams, Assistant to the Director-Deputy Associate Director (Investigation) of the FBI, sworn to October 1, 1976. Mr. Adams' affidavit concluded:

There is no other single investigative technique employed by the FBI which furnishes as much critical assistance and information in the prevention, detection and investigation of criminal activity. The importance of protecting the identity of confidential informants cannot be over-emphasized. If disclosures were made here, the most important technique now employed by law enforcement agencies would be substantially damaged and the ability of these agencies to perform their assigned duties would be seriously impaired (635a).

In his subsequent testimony at a hearing on November 4, 1976, Mr. Adams summarized the FBI's concern over the impact of disclosure in this case as follows:

The effect of the disclosure of the 19 informants in their files would transcend the problems with those 19 informants but would carry over in all areas of our investigative operations.

And every informant in criminal, foreign counter intelligence, they make no distinction concerning an issue of whether an informant is domestic security or not. The issue is whether the FBI will be able to maintain as it has in the past the confidentiality of any source.

So the damage or effect would be concern or lack of confidence in our capability to maintain informant's confidentiality in areas of our operations (248a).

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E. The District Court's Treatment of the
Informant Issue.

Following the November 4 hearing, the District Judge conducted an in camera review of the informant files at issue and the telexes from FBI field offices which had served as the basis for many of the statements in Mr. Adams' affidavit. Thereafter, the Judge, at another conference on November 9, 1976, indicated that the informant privilege issue could not be decided until summaries of the informant files were provided to the Court. The Judge noted that the interrogatory answers previously filed were an inadequate substitute for summaries, since the interrogatories themselves "were quite narrow and do not call forth really what is of most interest and importance in the files" (237a). Rejecting further interrogatories as a method for eliciting additional information about the informants, the Judge instead requested plaintiffs to frame questions which would be answered in the summaries of the informant files. As the Court's remarks make clear, the purpose of the summaries was not only to inform the Court of the contents of the files, but also to permit the release of some information concerning informant conduct to plaintiffs without revealing informant identities (234a-237a).

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At a second conference concerning the preparation of informant summaries on November 19, 1976, the District Judge directed the Government to prepare the summaries and, to aid plaintiffs' attorneys in formulating questions to be answered in the summaries, the Court reviewed in general terms what he had found in his three day review of the 25 file drawers containing the files on the 19 informants then at issue (240a-242a). The District Judge stated that the summary project would ultimately encompass many more files than those in issue on the motion, since the summaries "may indicate there are some files which possibly should be produced . . . and some which should not. But without learning the contents of those documents no deliberation can even be thought of" (240a).

With the help of proposed questions submitted by plaintiffs, the Court dictated a list of subjects to be covered in the summaries into the record at a conference held on November 23, 1976. At the Court's request, the list of subjects was restated in letter form by the Government on November 26, 1976. Thereafter, pursuant to the Court's instructions, the Government prepared a detailed summary of each of the 18 informant files which provided biographical data on the informant and a description of:

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(i) the nature of the informant's associations with the plaintiff organizations, (ii) the SWP-YSA documents which the informant had turned over to the FBI, as well as the method by which the informant had obtained them, (iii) the information on the organizations and their members which the informant reported to the FBI, (iv) the nature of the informant's participation in the organizations, (v) the actions, if any, which the informant engaged in which could possibly have had a disruptive effect on the organization and (vi) the instructions, if any, given the informant by the FBI.

The extremely time-consuming and costly task of summarizing the 25 drawers of informant files was completed in April 1977, and, on April 14, 1977, the District Court held a conference to discuss what the summaries, along with the seven informant files already provided to plaintiffs, revealed. The Court indicated that the summaries were immensely helpful to him and had been prepared with extreme care and accuracy (103a-105a). In regard to plaintiffs' demand for production of the files themselves, the Court made the following observation:

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The problem with producing these files, the phrase that comes to me, "It is both too much and too little." I have always had the feeling -- and I still have the feeling -- that to merely concentrate on any sample or selection of the files is not enough. I am confirmed in that feeling. I think ... that a way has to be devised to provide information relating to all of the informant files.

I think that the chances are very great that this can be done without any substantial revelation of the identity of the informants because I am now reasonably convinced that the identity of the individuals in all, virtually all, cases would be almost useless to me as a judge or to the parties to the litigation (103a) (emphasis added).*

* When plaintiffs' counsel reiterated their position that identification of all informants and production of all informant files was essential to their case, the Court observed:

"I have got to tell you that if I had today ordered the production of all 18 of the contested files and by some miracle tomorrow the Court of Appeals sustained it and it became final, and you had them, I am prepared to tell that you will not have very much information. I qualify that by saying I don't think you would have much information over and above what we know now" (121a-122a).

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In the course of the April 14 hearing, the Court briefly summarized, without revealing the identity of any informant, the kinds of information contained in the informant files and summaries (105a-113a). He noted at the outset that three of the informants had never been SWP or YSA members or participants in their activities. As to the other informants, the Court noted: Each commonly provided detailed reports on the subject matter of the meetings he or she attended. Each informant also identified and gave physical descriptions of and background data, such as employment, residence and marital status, concerning the people they came in contact with in the SWP and/or YSA, without going into "intimate details" (103a-109a). In addition, the files indicated what role, if any, the informant played in the organizations beyond simply being members and attending meetings and special functions. Most of the informants also provided the FBI agents with whom they dealt with SWP and YSA documents they had access to by reason of their relationships with members or their positions within the organizations.* In that connection, the Court noted that, with the exception of Redfearn, the files revealed no unauthorized entries or burglaries, but did show that informants used their personal relationships with members and their

* For the most part, the documents supplied were copies. On the rare occasions that originals were supplied to the FBI, they were copied and then returned to the informant.

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party positions to obtain "non-public documents" (110a)* The Court also observed that the files contained an extremely limited number of references to COINTELPRO or disruptive activity (111a).

As to the informant conduct found by the Court to be common to most of the files reviewed, Judge Griesa was understandably of the view that summaries of the remaining approximately 280 member-informants' files would, likewise, reveal similar conduct and that, in view of the completeness of the files, it was unlikely, "except in rare cases, [that] anything could possibly be added to the information by taking any testimony" (113a-114a). Pursuant to the Court's request of April 14, 1977, the Government is in the process

* "Non-public" documents is a term developed during the lawsuit to describe documents obtained by informants which were not intended for public distribution but would be available to SWP/YSA members. Documents intended for public distribution included flyers announcing rallies, educational material and campaign literature. "Non-public" documents included such things as correspondence from SWP Headquarters to a local branch concerning fund raising and financial records relating to a particular branch.

In regard to "non-public documents," SWP leader Syd Stapleton has stated in an affidavit that:

All members of the SWP and YSA have access to and are expected to read written communications from the national offices of those organizations,

(FOOTNOTE CONTINUED ON FOLLOWING PAGE)

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(FOOTNOTE CONTINUED FROM PREVIOUS PAGE)

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which are regularly submitted to the branches to inform the membership of internal discussion in the SWP and YSA, and for comment by the members. Such communications are intended only for the membership.

Only certain members are permitted access to the mailing lists and other business records of the SWP and YSA (1025a).

Thus it would appear that many of the non-public documents referred to by the Court were accessible to informants simply by reason of their membership in SWP or YSA.

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of preparing for the Court a survey with respect to the 1300 informants to develop a statistical analysis of the scope and extent of informant involvement in and with the plaintiff organizations (115a-119a).

At still another conference concerning the 18 informant files on May 5, 1977, plaintiffs' counsel indicated that plaintiffs were unwilling to settle for anything less than the disclosure of the names of all informants used in the SWP-YSA investigation, including the 1000 non-member informants. Counsel argued that the heart of their case lay in the informants' presence in the plaintiff organizations and the manner in which informants allegedly participated in the activities of the organizations, particularly in policy-making. Plaintiffs' attorney asserted that the informant files were of little interest to them for the informants' activities within the organizations, which was their primary interest, purportedly would not be reflected in the FBI informant files. Plaintiffs' counsel proposed that the Court order the identification of all 1300 informants so that the plaintiff organizations could then interview their membership (and,

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presumably former members as well) to see if they could find some basis for claiming that at least some of the informants engaged in disruptive or divisive conduct, proof of which might enhance their damage claim. Then, according to counsel, plaintiffs would return to the Court and request production of the FBI files on those informants whose participation they believed was harmful (notwithstanding that the initial premise for this proposal was that the files would not disclose what plaintiffs were really looking for) (1249a-1252a, 1279a-1281a).

As the Court correctly observed, such a procedure would result in the total abrogation of the informant privilege (1280a). Furthermore, the Court reiterated its view that plaintiffs had not "made maximum use of the people whose identities you know," and that plaintiffs would probably not gain anything very useful by having the identities of the informants revealed (1254a).

F. The District Court's Order Compelling Disclosure

At the May 5 hearing, the Court proposed that, prior to any determination on the Government's claim of informant privilege, the 18 informant files be released to plaintiffs' counsel for their review under an order requiring the attorneys to maintain the confidentiality of the informants' identities.

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In that regard the Court stated:

I am confident if they saw this material or a reasonable sample they would have a more informed view of it and they would be in a position to either more intelligently oppose what I am suggesting or perhaps more intelligently cooperate with it (1257a).

Plaintiffs' attorneys found this procedure unacceptable because "as a matter of principle I would not look at any document unless one of my clients had access under the same protective order" (1259a), and the matter was temporarily dropped.

However, at an in camera conference on May 19, 1977, the Court again urged this procedure on the parties stating that "my main purpose in having Mr. Boudin see these files is so that he can intelligently discuss with the government attorneys and with the Court methods of assembling the necessary evidence with the least or minimum public revelation of the identities of informants" (80a).

By letter dated May 23, 1977 to the Court (1137a), plaintiffs' counsel agreed to accede to the Court's proposal that counsel examine the files under a protective order, but did so under the expressed understanding that such an examination would only be the first step in a discovery procedure which they urged should culminate in the revelation to their clients of all informant identities, members and non-members alike. The Government opposed the

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abrogation of the informant privilege proposed by the Court.

In a second in camera conference held on May 31, 1977, at which, in addition to the attorneys, Syd Stapleton, an SWP leader, was present, the Court ordered the Government to make the FBI files and summaries regarding the 18 informants available to four of plaintiffs' attorneys.* The attorneys were instructed not to reveal the contents of the files and summaries to anyone, including their clients, and not to reveal that they were given access to the files (37a-38a, 44a-45a).**

In making this determination, the District Judge observed that the actions of the informants "raised serious questions under the Federal Constitution, as well as other federal and state laws and legal doctrines" (37a). He further noted:

There are indications from the few files thus far examined that there may be a variety of tortious acts which were committed by the FBI, including trespass and conversion of property. The latter refers to removal of private documents for production to the FBI. The FBI and certain informants may have engaged in activities designed to intentionally destroy certain chapters of the SWP and YSA. The evidence about the FBI informants may reveal other activities giving rise to valid claims for damages.

* The four attorneys permitted to view the files are Leonard B. Boudin, Herbert Jordan, Margaret Winter (coincidentally a member of the SWP) and Mary Pike (56a).

** Mr. Stapleton was also directed not to reveal that plaintiffs' attorneys had been given access to the files (56a-57a).

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I am not attempting to indicate any view on the ultimate merits of any claim. I am only stating that there are questions which are sufficiently serious to merit thorough exploration of the evidence. (37a-38a).

In that connection, he concluded that without the participation of plaintiffs' counsel in analyzing the files an "intelligent" analysis of those issues could not take place and that any other procedure constituted a deprivation of counsels' right to develop their own evidence (39a).

The District Court never rendered a decision on whether plaintiffs' allegations concerning informant conduct, if proven, would give rise to any cognizable claim against the Government.* The Court also did not distinguish between the three individuals who had not participated in SWP or YSA activities and the 15 who had, nor did the Court provide for any special protection for those informants whose files did not reveal any kind of information which had not already come to plaintiffs' attention in the files previously produced.**

* In that regard, the Court stated on an earlier occasion that "I am not going to dismiss the case on technical grounds or other grounds relating to the Federal Tort Claims Act" (142a).

** The in camera conference at which the District Judge orally issued his disclosure order was held on May 31, 1977 and the transcript of that conference was filed and sealed on June 7, 1977.

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SUMMARY OF ARGUMENT

In this case the Government has invoked the informant privilege to protect the identities and files of approximately 1300 informants who provided the Government with information concerning SWP and YSA. The District Court has ordered that eighteen of the files, selected by plaintiffs on the basis of the Government's answers to interrogatories, be released to plaintiffs' counsel. The District Court has also indicated that similar orders may follow concerning many of the other informants.

If this procedure is ever to receive effective appellate scrutiny, it must be now. Otherwise this Court will have no opportunity to review a District Court ruling with profound implications for the informants directly involved, as well as for the use of informants by law enforcement. Accordingly, this is a case in which the exercise of this Court's jurisdiction, by mandamus or interlocutory appeal, is essential to the sound administration of justice.

The fundamental error of the District Court here is its decision to order disclosure of an enormous volume of privileged information without first making definitive rulings on whether the claims for which plaintiffs seek this discovery have a valid basis in law. The District Court's

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failure to decide these legal questions led it to direct the wholesale release of all files selected by plaintiffs instead of making a tailored discovery order focused on those of plaintiffs' claims capable of surviving a rigorous legal analysis. Finally, the District Court has not properly balanced whatever legitimate interests plaintiffs may have in discovery against the public interest in preserving the confidentiality of informants' identities.

The Government has a considerable interest in the protection of these informant files. Release of the files to plaintiffs' counsel is clearly inconsistent with the understanding of confidentiality upon which the informants relied when they furnished information to the Government. Any discovery by SWP or YSA of the identities of individual informants -- the chances of which are significantly increased by release of the files to plaintiffs' counsel -- exposes these informants to exactly the kind of harassment or embarrassment such as frivolous lawsuits designed to punish them for cooperating with law enforcement, which they reasonably believed the Government's promise of confidentiality would prevent. Besides this effect on the 18 informants, the District Court's decision, if not corrected, will significantly reduce the ability of law enforcement agencies to recruit

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informants in other investigations. Prospective informants will know that the Government has a very limited ability to prevent release of informants' identities. No longer will law enforcement authorities be entitled to promise anonymity to prospective informants by pointing out that the Government always has the option, as it does in a criminal case, to dismiss a prosecution rather than reveal the informant's identity. In addition, prospective informants will be asked to rely not on the security of the FBI, with its reputation for carefully guarding informants' names, but rather on the discretion of whatever attorney the target of the surveillance might hire to challenge the investigation. It is thus no exaggeration to say that the procedure adopted by the District Court is likely to lead to a significant reduction in the flow of information from private citizens to the Government in matters having nothing to do with SWP or YSA.

When balanced against these strong governmental interests in confidentiality, plaintiffs' interests in disclosure are not so substantial as to justify the District Court's order. In contrast to the usual position in which the informant privilege is litigated, plaintiffs here are not defendants in a criminal prosecution seeking to assert

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Fifth and Sixth Amendment rights. Indeed they have not even come forward with any significant allegation of actual or threatened injury caused by activities of FBI informants. Whatever interests they claim entitle them to discovery of the informants' identities are so speculative that even now, four years after their filing of the complaint, their injuries have still not been alleged with any particularity.

In addition even plaintiffs' general allegations concerning informants are without merit as a matter of law. Plaintiffs' injunctive claim, seeking a prohibition of any further investigation of SWP or YSA is on its face inconsistent with this Court's prior opinion in this case:

At first blush there would hardly seem to be a role less appropriate for or capable of effective performance by the federal judiciary than advance supervision of the investigative methods of the FBI on a case-by-case basis, particularly in the field of national security. 510 F.2d at 255.

The justification for such judicial intervention is particularly weak here since the Attorney General has terminated the SWP and YSA investigation and has promulgated guidelines with respect to domestic security investigations. In addition, Congress is presently deliberating on legislative regulation of such domestic security inquiries.

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Plaintiffs' additional injunctive request for access to the fruits of the SWP and YSA investigation for the purpose of destroying such material of course fails to recognize that disclosure of informants' identities to plaintiffs' counsel is not necessary in order to evaluate such a claim; and even if the Court determined that such a novel claim had merit, it could order the material destroyed without releasing it to plaintiffs. Plaintiffs' limited interest in destruction of the files, even if found meritorious, is hardly so substantial as to justify the Court's abrogation of the privilege.

Plaintiffs' claims for damages under the Federal Tort Claims Act are equally devoid of merit. Although the law is clear that the Tort Claims Act provides for liability only under local tort law, plaintiffs have utterly failed to articulate any viable theory upon which they can expect to establish the Government's liability in tort, even assuming the truth of their allegations. Their claims that the Government caused informants to infiltrate, manipulate and disrupt SWP and YSA chapters and that informants committed trespass and conversion with respect to plaintiffs' personal property simply fail to state a claim in tort. The various tort theories which plaintiffs' allegations might call

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to mind such as interference with contract rights, deprivation of prospective advantage and prima facie tort have all been strictly limited to the commercial context or other circumstances in which, unlike here, concrete allegations of specific injuries are present.

The fundamental policy underlying this widely recognized limitation on tort liability, to discourage highly abstract and speculative claims incapable of accurate evaluation, is clearly reflected in the Tort Claims Act which was enacted to compensate victims of traditionally recognized torts. Moreover, the 1974 amendment to the Tort Claims Act reflects Congress' continued intent to avoid the type of creative tort liability which plaintiffs assert here and its concomitant effects on law enforcement agencies. Focusing directly on the proper scope of liability growing out of law enforcement activities, Congress limited that liability to the specific areas of assault, battery, false imprisonment, false arrest, abuse of process and malicious prosecution, and left untouched the original exemption from liability for misrepresentation, deceit, and interference with contract rights. 28 U.S.C. § 2680(h). Against the background of the intent and language of the Tort Claims Act, as well as traditional notions of tort liability, it is clear that plaintiffs' claims for damages based on informants' conduct fail to state a claim upon which relief can be granted.

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In addition, plaintiffs' failure to comply with the two-year statute of limitations of the Tort Claims Act bars recovery on their informant claims. The record is clear that most if not all of the activities of which plaintiffs complain occurred more than two years before October, 1976 when they first filed their tort claim. Although plaintiffs claim that they did not discover their cause of action until some time after December, 1974, their original complaint filed in July 1973 but not asserting Tort Claim Act liability, shows plaintiffs to have been on notice of their claim. The District Court's denial of the Government's motion to dismiss on this ground, without opinion and without an evidentiary hearing on the issue of when plaintiffs learned of their claim or with due diligence could have discovered it, was error.

The final reason why the District Court's order here is erroneous is that, despite its serious impact on the informants and the law enforcement community, it makes no contribution to the resolution of this case. Since the District Court has already reviewed the informant files and the Government's summaries of them, allowing plaintiffs' counsel to review the files will not add to the Court's knowledge of the informants' activities. Conversely, since

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plaintiffs' counsel is under an order not to disclose information from the files, this procedure will be of little value to plaintiffs.

In sum this case has finally arrived at the point at which some fundamental questions of law must be decided. These issues are now ripe for resolution by this Court. After those decisions have been made, the informant aspect of the case will either have been eliminated entirely or so substantially reduced in scope that a practical approach to discovery, short of wholesale release of informant files, will be possible. Accordingly, the order of the District Court should be vacated.

ARGUMENT

I. THE COURT OF APPEALS HAS JURISDICTION TO REVIEW THE ORDER OF THE DISTRICT COURT UNDER BOTH 28 U.S.C. § 1651 and 28 U.S.C. § 1291.

A. The District Court's Order is Subject to Review by Mandamus

This Court has recognized that a writ of mandamus is appropriate when a District Court imposes an order which cannot be corrected on appeal from a final judgment in the case. Thus in International Business Machines Corp. v. Edelstein, 526 F.2d 37, 40 (2d Cir. 1975), the Court held that,

...appellate review will be defeated if the writ does not issue, for petitioner's claims are not of the kind that will be merged into any final judgment and thus be capable of correction on appeal. This, too, is a proper ground for the issuance of a writ of mandamus.

This holding is particularly applicable here. No matter how the District Court may finally rule on the question of whether informants' identities should be publicly disclosed, the critical abrogation of the informant privilege inherent in the District Court's disclosure to plaintiff's counsel simply could not be rectified on appeal from a final judgment. Indeed, even if the District Court decides, following review of the informant files by plaintiffs' counsel, that the informants' identities should not be disclosed to plaintiffs, such a decision would not erase the prior disclosure to plaintiffs' counsel and the serious compromise of informants' identities which the District Court's procedure entails.*

* The present situation is similar to that before this Court in December, 1974, when the Government appealed Judge Griesa's grant of a preliminary injunction. Socialist Workers Party v. Attorney General, 510 F.2d 253 (2d Cir. 1974), stay denied, 419 U.S. 1314 (1974) (Marshall, J.). Just as the preliminary injunction set aside at that time would have required disclosure of informants' identities, even though the Government might ultimately prevail on the merits, so too here, Judge Griesa's present order will require disclosure of informants' identities to plaintiffs' counsel even though he may ultimately rule that plaintiffs' are not entitled to such disclosure or even sustain the Government's case on the merits.

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If the District Court's order compelling disclosure of the identity of eighteen informants and threatening the anonymity of some 1,300 more is ever to be reviewed before its harm becomes irreversible, that review must take place now.

Metros v. United States District Court, 441 F.2d 313 (10th Cir. 1971), is directly in point. In that case, an action to recover damages for an allegedly unlawful search, the Tenth Circuit issued an extraordinary writ reversing a district court's order, remarkably similar to that issued by the District Court here, which required disclosure of the identity of a police informer to plaintiff's counsel "for his knowledge and use only".* The Metros Court stated in language directly applicable to the present case:

...we must consider the reality of the situation when the informer's name has once been revealed. This is an act which is irreversible on appeal. It does not fit into the usual categories for final orders as defendants argue. Instead, it presents a typical circumstance for an application for extraordinary relief. 441 F.2d at 315.

Similarly, court-ordered disclosure of informants' identities to counsel for the SWP and YSA obviously could never be

* Judge Griesa's order in this case directs production of the informant files "to plaintiffs' counsel for their use and their use only..." (35a).

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reversed on appeal and must be corrected, if at all, by interlocutory review. Accord Usery v. Ritter, 547 F.2d 528 (10th Cir. 1977) which also holds that an order requiring disclosure of an informant's identity can be challenged by mandamus.

The use of mandamus to correct a clear abuse of discretion amounting to action outside the scope of a District Court's authority reinforces its availability in this case. See Kerr v. United States District Court, 426 U.S. 394, 402-03 (1976); Will v. United States, 389 U.S. 90, 104 (1967). The abuse of discretion at issue here is the District Court's adoption of a procedure that will abrogate the Government's claim of informant privilege, even though plaintiffs have no valid claims with respect to informant activity. The opinion in Metros indicates the availability of mandamus under these circumstances; for, in that case, the court of appeals analyzed the validity of the plaintiffs' alleged claims in determining whether it was proper for the district court to order disclosure of an informant's identity. See also United States Board of Parole v. Merhige, 487 F.2d 25, 29 (4th Cir. 1973), cert. denied 417 U.S. 918 (1974). Closely related to that issue is the District Court's apparent use of a procedure for determining whether privileged materials

should be disclosed to plaintiffs that itself constitutes a serious violation of the privilege. See United States v. Reynolds, 345 U.S. 1, 8 (1953); Kenyatta v. Kelly, 375 F. Supp. 1175, 1176 (E.D. Pa. 1974).

Mandamus is also appropriate because of its availability where, as here, important public issues of first impression are involved. United States v. United States District Court, 444 F.2d 651, 654-656 (6th Cir. 1971), aff'd., 407 U.S. 297 (1972); Nixon v. Sirica, 487 F.2d 700 (D.C. Cir. 1973). The instant litigation presents the first case in this Circuit where massive disclosure of Government informants has been sought by a plaintiff in civil litigation. Moreover, the case arises against a background of public concern over the proper use of informants by intelligence agencies and under circumstances where the District Court's action may well cause irreparable harm to the ability of Government agencies to utilize informants in situations beyond the scope of this litigation.* Indeed,

* Mandamus is also appropriate here as a supervisory method to guarantee proper judicial administration not only in the present case but in other litigation as well. See, e.g., United States v. Newman, 549 F. 2d 240 (2d Cir. 1977); United States v. Werker, 535 F.2d 198 (2d Cir. 1976). Unless corrected by mandamus, the District Court's procedure would very likely have a continuing, detrimental impact upon the administration of justice, for it would sanction the discovery of privileged materials without adequate testing of the legal sufficiency of the claims asserted as a basis for such discovery.

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perhaps the most important interest which the Government seeks to protect in this litigation, the ability to utilize informants in law enforcement, will be severely damaged if the District Court's order goes unchallenged.

B. The District Court's Order Is Appealable
Under The Collateral Order Doctrine

Under the circumstances of this case, Judge Griesa's order also constitutes a "collateral order" which can be appealed pursuant to 28 U.S.C. § 1291. See Cohen v. Beneficial Indus. Loan Co., 337 U.S. 541 (1949). While this Court has repeatedly held that discovery orders are not within the purview of Cohen even when claims of privilege are involved,* it has also repeatedly emphasized that a major factor in determining whether an order comes within the purview of Cohen is whether the issue sought to be appealed can be finally settled not only for the case at hand but for future cases as well. See, e.g., Weight Watchers of Philadelphia, Inc. v. Weight Watchers International, Inc., 455 F.2d 770 (2d Cir. 1972). One such issue which Judge Griesa's order poses is whether, in adjudicating a claim of informant's privilege, the informant's identity should be revealed to counsel for the proponent of discovery before the District

* Xerox Corp. v. SCM Corp., 534 F.2d 1031 (2d Cir. 1976); International Business Machines Corp. v. United States, 480 F.2d 293 (2d Cir. 1973) (en banc), cert. denied, 416 U.S. 980 (1974).

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Court has even decided whether there are valid claims with respect to the material for which disclosure is sought. As such, this procedure raises a discrete legal question that is likely to recur given the increasing volume of cases against intelligence agencies* and, indeed, will present itself again in the instant case with respect to the remaining 1,300 informants. Moreover, there is every reason to believe that the District Court's approach would also be urged in criminal cases.

As for the remaining criteria governing whether an order is collateral, it should be apparent that Judge Griesa's order is too serious to be denied review and that appellate review at the end of the case will be ineffective. 9 J. Moore,

* See U.S. General Accounting Office, Lawsuits Against the Government Relating to a Bill to Amend the Privacy Act of 1974 (1977) which identifies 143 such suits as of June 1, 1976. Suits brought by groups ranging from the Black Panther Party to the Klu Klux Klan will raise similar questions of informant privilege. Compare Black Panther Party v. Levi, Civ. No. 76-2205 (D.D.C. 1976) with Miles v. Kelly, Civ. No. 77-M-0501-5 (N.D. Ala. 1977). In this Circuit, for example, analogous problems concerning the informant privilege are likely to arise in such cases as National Lawyers Guild v. Attorney General, Civ. No. 77-0999 (S.D.N.Y.) (Brieant, J.), and Clavir v. Levi, Civ. No. 76-1071 (S.D.N.Y.) (Owen, J.). Indeed, an issue similar to that presented here has already arisen in Kinoy v. Mitchell, Civil No. 70-5698 (S.D.N.Y.), where in passing on a claim of state secrets with respect to electronic surveillance materials, Judge Ward has declined to order production of the subject materials to counsel and the plaintiff under a protective order. See Order dated March 23, 1977.

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Federal Practice ¶ 110.10 at 133 (2d ed. 1973). In a real sense, moreover, the procedural issue raised here is "separable from, and collateral to" rights asserted in this action since it deals with the procedure to be employed in adjudicating a privilege question. See Weight Waters, supra at 773.

II. THE DISTRICT COURT'S ORDER
ABROGATES THE INFORMANT PRIVILEGE

A. The Informant Privilege
Applies in this Case

The informant privilege protects the identity of those 18 persons who furnished information to the Government in reliance upon a pledge of confidentiality. That informants' identities are privileged from disclosure is a proposition which is well established in the law. Roviaro v. United States, 353 U.S. 53 (1957). As Roviaro holds, this privilege embodies the "public interest in protecting the flow of information . . ." to the Government. See also Weatherford v. Bursey, 45 U.S.L.W. 4154, 4157 (1977) where the Supreme Court recently reaffirmed the value to law enforcement from confidential sources who are able to provide information due to their "undercover" status.

While the development of the informant privilege has taken place principally in criminal cases, the privilege

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clearly applies in civil litigation. Usery v. Ritter, 547 F.2d 528 (10th Cir. 1977); Hodgson v. Charles Martin Inspectors of Petroleum, Inc., 459 F. 2d 303 (5th Cir. 1972); Wirtz v. B.A.C. Steel Products, Inc., 312 F.2d 14 (4th Cir. 1962); Mitchell v. Roma, 265 F.2d 633 (3d Cir. 1959); In re Emprise Corp., 344 F. Supp. 319 (W.D.N.Y. 1972); Black v. Sheraton Corp., 47 F.R.D. 263, 272 (D.C. Cir. 1969) (Sirica, J.). In Black v. Sheraton Corp., supra, plaintiff sued the United States because of electronic surveillance which the FBI had conducted of his hotel room and demanded the identity of informants who allegedly assisted the FBI in conducting its surveillance. In denying plaintiff's demand, Judge Sirica held that the Government has a recognized right "to protect the sources of its information and the individuals who assist it" regardless of whether their identities are sought in criminal proceedings or civil litigation.* Black, supra at 272.

Indeed, sound public policy and the few cases which are in point confirm that the informant privilege should be stronger in civil litigation where a plaintiff seeks discovery of an informant's identity than in those

* A necessary corollary to this proposition is that information which would identify an informant is also protected from disclosure by the informant privilege. See Bowman Dairy Co. v. United States, 341 U.S. 214, 221 (1951); Wirtz v. Robinson & Stephens, Inc., 368 F.2d 114 (5th Cir. 1966).

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cases where a defendant seeks disclosure in order to obtain exculpatory evidence. Black, supra, at 272; In re Gurnsey's Petition, 223 F. Supp. 359 (D.D.C. 1963); Bocchicchio v. Curtis Publishing Co., 203 F. Supp. 403 (E.D. Pa. 1962).

The reason for such a rule can be demonstrated by reference to those categories of cases which make up the principal body of law concerning disclosure of an informant's identity, namely criminal proceedings and civil cases where the Government seeks to enforce a statute against a defendant, such as in civil antitrust cases or actions under the Fair Labor Standards Act. In such cases, the recognized public interest in preserving the confidentiality of those who provide information to law enforcement agencies is protected in two ways. First, the proponent of disclosure has the burden of demonstrating that the informant will provide exculpatory evidence which, as a matter of law, is both relevant and material to his defense, and that disclosure of the informant's identity under those circumstances does not outweigh the public interest in confidentiality.* Second,

* See, e.g., United States v. Marshall, 526 F.2d 1349 (9th Cir. 1975). That this burden is imposed upon a defendant in a criminal case, who may face substantial penalties and who is armed with the guarantees of a full and fair trial under the Fifth and Sixth Amendments attests to the inherent strength of the informant privilege.

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even if disclosure is ordered the Government still has the option of dismissing its case rather than disclosing the informant's identity.

A plaintiff's interest in disclosure in a suit against the Government is simply not on a par with those of a party who faces criminal or civil sanctions. Black v. Sheraton Corp., supra. Accordingly to provide the public interest equivalent protection in cases where the Government is a defendant requires, at the very least, that the proponent of disclosure make a compelling demonstration that relevant and material information essential to the prosecution of whatever valid claims he might have cannot be obtained without such disclosure, and that the private interest represented by disclosure clearly outweighs the public interest in confidentiality.* Indeed, with the exception of one case that is wrongly decided,** plaintiffs have been

* As Black, supra, points out:

The focus in Roviaro is on the plaintiff's variable need vis-a-vis the government's more or less constant need to preserve the anonymity and maintain the cooperation of its informers. 47 F.R.D. at 272.

** The exception is Alliance to End Repression v. Rochford, Civil Action No. 74-3268 (N.D. Ill. 1977), where the district court by opinions dated June 7, 1977 and March 26, 1976 has ordered disclosure of informant files on the erroneous assumption that the informant privilege does not apply in civil cases and that informants' identities are not protected unless the informants report actual evidence of crimes. The Government is now seeking appellate review of the district court's order.

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refused disclosure of informants' identities. See Black, supra, which summarizes the state of the law.

B. The District Court's Order Compels the Disclosure of Privileged Information.

Despite the recognized public interest in protecting informants' identities, the District Court has issued an order which runs directly contrary to that interest and reflects an approach to the question of disclosure that is inconsistent with the strength of the privilege. Disclosure of the informant files to plaintiffs' counsel, even under a protective order, clearly constitutes a violation of the informant privilege.* Indeed, Metros v. United States District Court, 441 F.2d 331 (10th Cir. 1971), the very case which forms the principal support for mandamus jurisdiction here, makes clear that disclosure limited to opposing counsel is inconsistent with the privilege. See also, Kerr v. United States District Court, 426 U.S. 394, 402-403 (1976), where the Supreme Court implicitly accepted petitioner's contention that disclosure of privileged material to opposing counsel and selected client representatives under a protective order nevertheless constituted a breach of the privilege. Moreover, in practical terms the District Court's order

* The informant files naturally contain the names of the 18 informants and a wealth of details which would allow the plaintiffs to identify these informants, even if their names were deleted.

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means that information which law enforcement personnel are trained to protect will be disclosed to individuals who have no background in safeguarding such material.* Indeed, plaintiffs' counsel will now be asked to make every effort to protect the confidentiality of information with respect to which they have previously made every effort to have the protection of confidentiality removed while they continue to represent the same client who seeks access to that information. As one district court has recognized in a similar situation:

We doubt that any more dangerous precedent could be set than to have granted plaintiffs' motion. To permit an attorney, even though an officer of the court, to promiscuously browse through police files would be disruptive of any law enforcement agency. Donohue v. Duling, 330 F. Supp. 308, 312 (D.Va. 1971), aff'd, 465 F.2d 196 (4th Cir. 1972).

The District Court's order fails to recognize the very real danger that plaintiffs' counsel, even with the best intentions, will inadvertently reveal informants'

* In this connection the present situation is analogous to the disclosure of classified information, which, it has been recognized, neither attorneys nor Courts are well equipped to safeguard. See Alfred A. Knopf, Inc. v. Colby, 509 F.2d 1362, 1369 (4th Cir. 1975), cert. denied, 421 U.S. 992 (1975).

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identities or information which will compromise their identities. The plaintiffs have sought, through their own methods, to discover the identities of informants. Hence, there is every reason to believe that plaintiffs will be examining their counsels' advice for indications which, when pieced together with other information, would identify an informant. One obvious example of this problem is that upon reviewing the informant files, plaintiffs' counsel will know the location of all 18 informants. When asked by plaintiffs where the SWP's investigative resources would be better spent in San Diego or Albany, counsel's response would inevitably be affected if he knows that there are 3 informants in Albany, and none in San Diego (93a).^{*} In addition, plaintiffs' counsel will be in an unavoidably strong position to advise the SWP and YSA on the best method to develop independent evidence tending to identify the 18 informants.

The District Court's conclusion that its protective order limiting disclosure to plaintiffs' counsel will adequately protect the public interest embodied in the informant

* It is also possible that plaintiffs' counsel, particularly Ms. Winter who is an SWP member, may know one or more of the informants and under the circumstances might find it extraordinarily difficult to keep that knowledge from the plaintiffs.

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privilege not only fails to consider the risks of disclosure inherent in this procedure but also overlooks the implications that the procedure has for the Government's use of informants in other investigations. Even accepting at face value the District Court's belief that such a protective order obviates all risks of retaliation or harassment, there is still simply no way to avoid the telling observation of Judge Sirica in Black, supra that:

. . . to the extent that a potential informer believes that his anonymity depends upon someone else's findings that disclosure would be dangerous to the informer he will necessarily be reluctant to give assistance. 47 F.R.D. at 272.

The District Court also assumes that informants in other investigations will not be concerned about a breach of their confidentiality because the Court's procedure will not be known to them. The District Court's procedure would remain secret, however, only if it is ultimately held to be erroneous.*

* As the District Court candidly recognized, the confidential nature of its procedure simply cannot be guaranteed (53a). While public revelation attendant to an accurate discussion of what the Court ordered would be damaging to the FBI's informant program, the District Court itself recognized that the public might receive a report of the proceedings without the distinction of the protective order (68a). In that event the likelihood of harm to the informant program would be further increased.

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If inspection of informant files is ultimately approved by this Court or the Supreme Court as a normal procedure for resolving questions of informant privilege then the FBI and other investigative agencies will be compelled to tell prospective informants that they cannot be protected against having their names revealed at least to attorneys for those about whom they supply information. That fact alone portends incalculable damage to the Government's use of informants since anyone who considers furnishing information to law enforcement agencies must now consider the implications of this procedure in the context of a civil action by those under investigation. Judicial endorsement of this procedure and the attendant release to plaintiffs' counsel of the identities of at least eighteen and possibly 1300 FBI informants would thus strike at the very heart of all government informant programs by undermining the Government's pledge of confidentiality.

III. THE DISTRICT COURT HAD NO VALID BASIS
FOR ABROGATING THE INFORMANT PRIVILEGE.

The record in this case provides no basis for the disclosure which the District Court has ordered. First, the District Court has not decided whether the claims which plaintiffs assert as a basis for this discovery have any validity as a matter of law. Second, a thorough examination of the record in light of applicable law reveals that those

claims which constitute plaintiffs' principal basis for disclosure of the informant files are without legal foundation. Third, even assuming that the plaintiffs have alleged a valid cause for which the informant files may be relevant the District Court has failed to consider whether plaintiffs' interests in this particular form of discovery outweigh the Government's interests in maintaining the confidentiality of its informants. Finally, as a result of these errors, the District Court has ordered the wholesale disclosure of all eighteen files instead of first carefully scrutinizing plaintiffs' claims and then fashioning a discovery order limited to those claims which survive vigorous analysis.

A. Plaintiffs Have Asserted No Valid Claim
With Respect to Informant Activity in This
Action

1. Plaintiffs' Claims for Injunctive Relief
Furnish No Basis for Disclosure

The gravamen of plaintiffs' claims for injunctive relief with respect to informants is their demand that the FBI stop employing informants in the SWP and YSA.* Yet this demand has, in effect, already been granted by the Attorney

* The injunctive portion of the "Wherefore Clause" in plaintiffs' Second Amended Complaint seeks an injunction prohibiting the FBI from (1) inducing members and supporters of SWP and YSA to act as informants, (2) infiltrating the SWP and YSA, and (3) using informants to participate in SWP and YSA (487a).

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General's termination of the FBI's investigation of SWP and YSA on September 9, 1976.* Moreover, the Attorney General reached his decision pursuant to the Guidelines for Domestic Security Investigations which were promulgated in April, 1976 (1199a-1207a).**

The Attorney General's decision thus renders plaintiffs' claims for injunctive relief moot and these claims cannot be a basis for disclosure. A concession by the Government concerning what it will not do in the future is dispositive:

The Second Circuit has thus indicated that a representation by the United States Government that its past conduct will not re-occur must be taken as truthful." Cherry v. Postmaster General, 332 F. Supp. 785, 789 (S.D.N.Y. 1971), aff'd, 460 F.2d 1063 (2d Cir. 1972).

Here the Attorney General's order that the investigation not continue eliminates any need for injunctive relief. See Consumers Union v. Veterans Administration, 436 F.2d 1363 (2d Cir. 1971).

* See Deposition of Clarence Kelley held on November 3, 1976 at 38-60 (1166a-1198a), which sets forth the termination of the investigation and the steps taken by the Director of the FBI to implement the Attorney General's decision and cease the use of informants in SWP and YSA.

** These guidelines establish the categories of domestic security investigations, ranging from "preliminary" to "full" which can be undertaken with respect to groups whose activities "involve or will involve the use of force and violence" and the violation of federal law for the purpose of overthrowing the Government of the United States.

Termination of the investigation has eliminated any claim by plaintiffs that they face the "actual present or immediately threatened injury" which Laird v. Tatum, 408 U.S. 1, 15 (1972) requires as a necessary prerequisite to equitable intervention.

In addition, the Attorney General's guidelines are a factor which must play an important role in the determination of mootness. These guidelines provide a definitive standard for ongoing and future investigations, and the Attorney General has concluded that the plaintiff organizations do not now meet the criteria of the guidelines. Hence standards have been established* which give the plaintiffs the very relief which they seek. Caprio v. Wilson, 513 F.2d 837 (9th Cir. 1975); Giumarra Vineyards Corp. v. Farrell, 431 F.2d 923 (9th Cir. 1970).

Even if the Attorney General's decision has not rendered the plaintiffs' injunctive claims moot, those claims still provide no basis for the disclosure which the District Court has ordered. The basic data necessary for litigation of plaintiffs' injunctive claims has already been developed, and, if necessary, can be augmented by means other than the wholesale disclosure ordered by the District Court. Indeed, at the District Court's request, the Government

* Congress is presently considering enactment of the guidelines as part of a comprehensive charter for the FBI. See 123 Cong. Rec. D882 (daily ed. June 6, 1977).

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has already undertaken the development of additional evidence on the extent of informant coverage. Through the Government's answers to interrogatories and the District Court's own summary of the generic categories of information contained in the 18 files*, the plaintiffs have already learned an enormous amount of information concerning the use of informants, such as the positions held by informants, how they became informants, how long they remained informants, what meetings they attended, what information they reported to the FBI, and what instructions they received from the FBI. The files of Hollowell, Neal, Hertz, Norton, Nilson, Cooper, and Redfearn (comprising a total of over 82 volumes) permit plaintiffs an extensive view of how informants operate.** Moreover, to the extent plaintiffs seek injunctive relief because the presence of informants allegedly "chilled" their First Amendment rights, the Government admits that informants were utilized in the SWP and YSA until the termination of the FBI's investigation in September, 1976. Plaintiffs themselves presumably know whether or not they were "chilled"

* At a pretrial conference on April 14, 1977 the Court summarized for the plaintiffs the various kinds of activities reflected in the 18 informants files (100a-115a).

** These files were produced to the plaintiffs because each informant either directly or indirectly had revealed his identity to the plaintiffs, so that there could no longer be an interest in preserving the informants' confidentiality.

and do not need the informant files to support this allegation.*

For all practical purposes, then, the present case with its extensive admissions by the Government on the presence and use of informants would seem to be governed by the holding in Black v. Sheraton, 47 F.R.D. 263, 270-271 (D.D.C. 1969) (Sirica, J.):

The Government has admitted the fact of the surveillance. Plaintiff has no interest in and consequently in fairness, could not demand that the government disclose the names of its informers.

Apart from mootness and the absence of a genuine need for additional evidence, another consideration makes it clear that plaintiffs' claim for injunctive relief cannot be considered as a basis for disclosure. This is the fact that plaintiffs' attempt to have the District Court enjoin the Executive branch from undertaking a criminal or domestic security investigation is simply inconsistent with the separation of powers embodied in the Constitution. As this Court held when the present case was last before it:

At first blush there would hardly seem to be a role less appropriate for or capable of effective performance by the federal judiciary than advance supervision of the investigative methods of the FBI on a case-by-case basis, particularly in the field of national security. Socialist Workers Party v. Attorney General, 510 F.2d 253, 255 (2d Cir. 1974).

* Plaintiffs' logic here is paradoxical at best since they apparently need to know informants' identities to determine how they refrained from exercising their First Amendment rights even though they cannot presently identify examples of such forbearance.

In short, the question that plaintiffs' claim for injunctive relief poses is simply not justiciable because it would involve the judiciary in just the kind of monitoring of Executive action which the Supreme Court rejected in Laird v. Tatum, 408 U.S. 1, 15 (1972). See also United States v. United States District Court, 407 U.S. 297, 312 (1972).

This authority demonstrates that the District Court's apparent misgivings about whether the FBI's investigation of the SWP and YSA had any valid law enforcement purpose could not serve as a valid basis for the disclosure that was ordered.* Moreover to predicate an informant's confidentiality on a post hoc determination of an investigation's wisdom simply decreases the likelihood of informant cooperation, since no informant could ever be sure that a particular investigation might not later be deemed unwise. Cf. Black v. Sheraton Corp., supra, at 271-72.

In any event, the FBI's investigation of SWP and YSA did have a valid law enforcement purpose since it was based upon the need to determine whether the two Trotskyist groups had passed beyond mere revolutionary rhetoric to

* The District Court did not state whether its observations were intended to relate to plaintiffs' claims for injunctive relief or for damages. To the extent that the District Court intended to suggest that plaintiffs might have a cause of action for damages under the FTCA based on the FBI's decision to investigate the SWP, any such claim would be barred by the discretionary function exemption of 28 U.S.C. § 2680(a). See, e.g., Monarch Ins. Co. v. Dist. of Columbia, 353 F.Supp. 1249, 1253-57 (D.D.C. 1973), aff'd, 497 F.2d 684 (D.C. Cir. 1973), cert. denied, 419 U.S. 1021 (1974).

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actual violations of federal statutes.* As this Court also recognized when this matter was last before it:

The FBI has a right, indeed a duty, to keep itself informed with respect to the possible commission of crimes; it is not obliged to wear blinders until it may be too late for prevention. 510 F.2d at 256. (emphasis added).**

In addition, it was entirely proper for the FBI to use informants to provide accurate information about the intentions and capabilities of SWP which, by the very nature

* The leaders of the Socialist Workers Party, who were convicted of advocating the violent overthrow of the Government in Dunne v. United States, 138 F.2d 137 (8th Cir. 1943), cert. denied, 320 U.S. 790 (1943) remained in control of the party through the 1960's. In commenting upon the SWP's attempt to obscure its commitment to revolutionary violence in opaque language the Dunne Court showed remarkable prescience:

Courts should be careful in all things-- particularly and equally where basic human liberties or where the life of the country is involved--but they do neither liberty nor their country a service by being so naive or simple as not to take into account human nature and existing situations known to every alert adult in the country. 138 F.2d at 144.

** A review of the 18 informant files clearly indicates that there were reports which strongly suggested that the SWP was engaged in a systematic violation of the Voorhis Act, 18 U.S.C. § 2386, as well as other federal statutes. Since the SWP appears to be an integral part of the Fourth International, a foreign revolutionary organization, the Voorhis Act, which requires American groups that belong to such organizations to register with the Attorney General, is particularly apposite. The other statutes are 8 U.S.C. §§ 1323, 1324, 1327, and 22 U.S.C. § 611 et seq (Supp. 1977) (1132a).

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of its political ideology* remains committed to the overthrow of the Government by force and violence. As United States v. United States District Court, 407 U.S. 297 (1972), makes clear, the Executive has not only the right but the responsibility to conduct such investigations in the interests of the internal security of the United States. See also Kinoy v. Mitchell, 67 F.R.D. 1, 6 (S.D.N.Y. 1975) (Ward, J.)**

Indeed, the FBI's concerns appear to have been reasonable under the circumstances since there is evidence which indicates that SWP forms an integral part of the Fourth International, an organization that in the past has been ideologically committed to revolutionary terrorism, and whose constituent sections have carried out assassinations, kidnappings and other acts of political violence including the bombing of American facilities abroad (854a-984a).

* The SWP's resolution on its organizational character makes clear that the party is a "revolutionary workers party" that subscribes to the Trotskyist variant of Communist ideology and which subordinates "[a]ll of its activities, its methods and its internal regime" to preparing for the seizure of power (1158a). As stated in the resolution, "the struggle for power organized and led by the revolutionary party is the most ruthless and irreconcilable in all history" (1159a).

** Groups which are committed to the violent overthrow of the government may often be circumspect in publicly announcing their aims and methods. This compels the use of methods which do not rely on public statements, and the employment of informants is just such an investigative technique. See United States v. Dennis, 183 F.2d 201, 224 (2d Cir. 1950) (Hand, J.), aff'd, 341 U.S. 494 (1951).

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The Attorney General's termination of the FBI's investigation does not represent an admission that the investigation lacked a valid law enforcement purpose but rather constitutes a frank recognition that the Socialist Workers Party presently lacks either the capacity or the will to translate its revolutionary rhetoric into violent action.* Hence the District Court's apparent reliance upon that decision as a basis for questioning the validity of the FBI's investigation cannot be justified (47a).

Also apparently related to the question of injunctive relief is the additional reason for disclosure which the District Court articulated for the first time at a conference held on June 22, 1977, namely that certain informant files contained information about the Inter-

* Moreover certain important figures in the Socialist Workers Party, including its 1976 presidential candidate, have at one time held important positions of leadership in the Fourth International (860a).

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nationalist Tendency.* Plaintiffs, however, have never requested this information and if anything, certainly have more direct knowledge about this faction than does the FBI. Accordingly, they need not have informants' identities in order to be more informed about something that they already know. To the extent that the District Court following its review of the informant files evaluates the significance of the Internationalist Tendency differently than the FBI and perceives this as a valid basis for curtailing the Executive's recognized power to conduct domestic security investigations, it again fails to heed the teaching of this Court in its prior opinion and of the Supreme Court in Laird v. Tatum, 408 U.S. 1 (1975).

2. There is No Substantial Showing That Plaintiffs Have Any Valid Claims For Damages Against the United States.

As a justification for the disclosure which it has ordered, the District Court relied upon the possibility that under the Federal Tort Claims Act ("FTCA") plaintiffs may have a claim for damages against the United States with respect to informant activity. An analysis, however, of both plaintiffs' allegations concerning informant activity

* As this Court will recall from the prior appeal in this case, the Internationalist Tendency was the faction in the Socialist Workers Party which favored the majority position of the Fourth International on revolutionary violence. While members of this faction were expelled from the SWP in July, 1974 for alleged breaches of party discipline, discovery by the Government subsequent to the Court's decision in December, 1974 indicates that some members of this faction have been readmitted into the SWP and that the Fourth International has called on SWP to reintegrate the Internationalist Tendency members (1209a-1234a).

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and the record in this case reveals that these putative claims are without legal merit.* Plaintiffs' supposed need for the informant files to support damage claims can, therefore, provide no basis for the District Court's order.

As a threshold matter, it must of course be recognized that plaintiffs can recover damages against the United States for allegedly wrongful acts only by demonstrating that sovereign immunity has been waived with respect to their claims. See, e.g., United States v. Testan, 424 U.S. 392, 401-402 (1976). The waiver of sovereign immunity on which plaintiffs rely and which represents their exclusive basis for damages against the United States is the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671 et seq.** Hence their claims for damages, which in the main, constitute novel attempts to extend existing tort law far beyond its boundaries must be measured against a statute whose effect was "to waive [sovereign]

* In criminal cases, where the proponent of disclosure needs information to defend himself against penal sanctions, the legal theories sought to be advanced by disclosure of an informant's identity are fully tested before disclosure is ordered. See e.g., United States v. Marshal, 526 F.2d 1349 (9th Cir. 1975); Alvarez v. United States, 525 F.2d 980 (5th Cir. 1976), cert. denied, 425 U.S. 995 (1976); United States v. Morell, 524 F.2d 550 (2d Cir. 1975).

** Plaintiffs have filed two administrative claims with respect to informant activity, each dated October 28, 1976 (1234a-1245a).

immunity from recognized causes of action and ...not to visit the Government with novel and unprecedented liabilities." Feres v. United States, 340 U.S. 135, 1426 (1950). Indeed, the principal focus of congressional intent in enacting the FTCA was to provide recovery for the "ordinary common-law torts", especially negligent operation of motor vehicles. See Dalehite v. United States, 346 U.S. 15, 28 (1953). Moreover, the language and legislative history to the 1974 amendments to the FTCA evinces a Congressional concern against making law enforcement conduct the subject of highly speculative claims for damages.

a. Plaintiffs Have No Valid Claims for Manipulation or Disruption

While the District Court makes no specific reference to these issues as a basis for disclosure, plaintiffs' principal claim for damages under the FTCA with respect to informant activity is that informants allegedly manipulated and disrupted SWP and YSA. In that connection, plaintiffs have attempted to predicate their claim for damages upon

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Constitutional grounds.* Yet this attempt to establish a claim under the FTCA runs directly counter to 28 U.S.C. § 1346(b) which waives sovereign immunity only as to acts of Government employees:

...under circumstances where the United States, if a private person would be liable to the claimant in accordance with the law of the place where the act or omission occurred. (emphasis added).

By that carefully chosen language, Congress intended to subject the United States to liability only for conduct which, when engaged in by a private citizen, would be actionable under the law of the state where it occurred. The First Amendment, of course, does not provide a standard of conduct governing the actions of private citizens. Hence, any claim against the United States based upon an alleged violation of the First Amendment does not come within the waiver of sovereign immunity in the FTCA. Indeed, the limitation on Government action affecting speech which is contained in the First Amendment to the very charter that establishes the Government would seem to embody a duty that is so essentially governmental in character as

* Plaintiffs maintain that the use of the informants to:

disrupt and manipulate a political organization is a use which is dramatically different from mere information gathering, and gives rise to different forms of injury and causes of action, principally under the First Amendment (1534a).

to be completely outside what Congress had in mind when waiving sovereign immunity for "common law torts." See Dalehite, supra; Feres, supra. Moreover, as Congress itself recognized in 1974 when considering a narrowing of the intentional tort exemption embodied in 28 U.S.C.

§ 2680(h):

As a general principle under present law, if a Federal agent violates someone's constitutional rights - for instance, Fourth Amendment rights against illegal search and seizure - there is no remedy against the Federal Government. This ancient doctrine - sovereign immunity - stands as a bar. S.Rep. No. 588, 93d Cong., 2d Sess. 2-3 (1973).*

Furthermore, by the language of 28 U.S.C. § 1346(b) it is clear that under the FTCA state law furnishes the basis for determining whether any asserted claim is valid. See Hess v. United States, 361 U.S. 314 (1960); Feres v. United States, 340 U.S. 135, 142 (1950). Therefore any claim, such as the plaintiffs', which is grounded in some alleged transgression of the First Amendment, but which has no basis in state law, does not come within the waiver of

* The presence of informants in the SWP and YSA, however, certainly did not violate the First Amendment, particularly since plaintiffs can point to no tangible harm from that presence and rely simply upon speculation and allegations of "subjective chill." This, however, hardly amounts to an infraction of First Amendment rights. See Laird v. Tatum, 408 U.S. 1 (1972); Fifth Avenue Peace Parade Committee v. Gray, 480 F.2d 326 (2d Cir. 1973), cert. denied, 415 U.S. 948 (1973); Donohoe v. Duling, 465 F.2d 196 (4th Cir. 1972).

sovereign immunity permitted by the FTCA.* See Davis v. United States, 536 F.2d 758 (8th Cir. 1976); Baker v. F&F Investment Co., 489 F.2d 829 (7th Cir. 1973); United States v. Smith, 324 F.2d 622 (5th Cir. 1963); Monarch Insurance Co. of Ohio v. District of Columbia, 353 F. Supp. 1249, 1254 (D.D.C. 1973), aff'd, 497 F.2d 684 (D.C. Cir. 1973), cert. denied, 419 U.S. 1021 (1974); Smallwood v. United States, 358 F. Supp. 398 (E.D. Mo., 1973), aff'd, 486 F.2d 1407 (8th Cir. 1973).

Plaintiffs have also sought to characterize their claim about the alleged manipulative and disruptive use of informants as stating a claim under New York's law of "intentional interference with business relations", as well as prima facie tort. These theories, however, are clearly inapplicable to plaintiffs' claims, since the courts have strictly limited such doctrines to the commercial context and have required prospective plaintiffs to set forth their

* Neither this Court nor any district court in this Circuit has decided that the FTCA waived sovereign immunity for "constitutional torts," though the issue was presented in Accardi v. United States, 356 F. Supp. 218 (S.D.N.Y. 1973) (Weinfeld, J.) and is sub judice in Birnbaum v. United States, 76 Civ. No. 1937 (E.D.N.Y. 1977) (Weinstein, J.), an action for damages under the FTCA arising out of the CIA's interception of mail from the Soviet Union.

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damages with specificity. Plaintiffs' general allegations* of constitutional injuries clearly fail to bring them within the purview of the legal doctrines on which they rely.

While New York does recognize the business torts of inducing breach of contract and inducing others not to contract with a commercial enterprise, see e.g., Ryan v. Brooklyn Eye and Ear Hospital, 46 App. Div. 2d 87, 360 N.Y.S. 2d 912 (1974); Restatement (First) of Torts § 766 (1934)**, plaintiffs' claims for damages from the use of informants do not pertain either to breached contracts with SWP or YSA or with instances where SWP or YSA was prevented from contracting with some person for the profit of either organization. As for prima facie tort, that too "has not been extended beyond the field of commercial transactions

* Plaintiffs point to no specific instances of harm from such activity and simply claim that it caused SWP and YSA to lose some \$15,000,000 (777a, 781a).

** This section of Restatement provides in pertinent part:

... one who, without a privilege to do so, induces or otherwise purposely causes a third person not to:

- (a) perform or contract with another,
or
- (b) enter into or continue a business
relation with another

is liable to the other for the harm caused thereby (emphasis added).

..." Hammer v. Polsky, 36 Misc. 2d 482, 233 N.Y. S. 2d 110, 112 (Sup. Ct. 1962), and hence would have no applicability to SWP or YSA. Indeed, application of these business torts to the claims of either of the SWP or the YSA would involve a substantial incongruity since neither group is a business engaged in profit making activities and, hence, neither has the commercial interests which these torts seek to protect.

Furthermore, even if plaintiffs' claim were deemed to sound in prima facie tort, plaintiffs still allege no special damages which New York courts have found indispensable to a valid claim for prima facie tort. See e.g., Leather Development Corp. v. Dun & Bradstreet, Inc., 15 App. Div. 2d 761, 224 N.Y.S. 2d 513, 514 (1962), aff'd, 12 N.Y. 2d 909, 237 N.Y.S. 2d 1007 (1963). Instead, plaintiffs have merely asserted, at best, a claim for several million dollars, and "... damages pleaded in such round sums without any attempt at itemization, must be deemed allegations of general damages," which do not meet the special damage requirements of prima facie tort. Leather Development, supra at 514. See also Faulk v. Aware, Inc., 3 Misc. 2d 833, 155 N.Y.S. 2d 726, 732 (Sup. Ct. 1956), aff'd, 3 App. Div. 2d 703, 160 N.Y.S. 2d 621 (Mem. 1957), which dismissed for failure to allege special damages a claim of prima facie tort brought by John Henry Faulk, who alleged that his business as a radio commentator had been injured by defendant's labelling him a Communist or fellow traveler:

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Allegations of special damage must state specifically and with particularity the items of loss claimed by the plaintiff, giving the names of the employers, customers or others who are claimed to have taken away their business from plaintiff.

See also Eversharp, Inc. v. Pal Blade Co., 182 F.2d 779 (2d Cir. 1950); Morrison v. National Broadcasting Co., 19 N.Y. 2d 453, 458, 280 N.Y.S. 2d 641, 643-44 (1967).

Apart from plaintiffs' failure to articulate a valid legal basis for their claims, they have also made no specific allegation of any tangible harm from alleged efforts by informants to manipulate or disrupt SWP or YSA. Their injuries are apparently so imperceptible that they admit that they cannot know whether they were manipulated or disrupted until they examine the FBI files (782a 83a-786a). Plaintiffs categorically denied that either SWP or YSA has ever taken a position contrary to their best interests, one tangible result one might expect of manipulation. Plaintiffs' Answers Nos. 50-54, 60. Apparently plaintiffs will not recognize their injuries until after a judicially sanctioned fishing expedition through FBI informant files.* Yet it is just such an approach that the Supreme Court emphatically condemned in Laird v. Tatum, 408 U.S. 1, 14 (1972):

* Such an expedition proved virtually fruitless with the six files produced in August 1976 since plaintiffs conceded that the material found in those 7 files did not advance their case (124a).

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Stripped to its essentials, what respondents appear to be seeking is a broad-scale investigation, conducted by themselves as private parties armed with the subpoena power of a federal district court and the power of cross-examination, to probe into the Army's intelligence-gathering activities, with the district court determining at the conclusion of that investigation the extent to which those activities may or may not be appropriate to the Army's mission.

Absent plaintiffs' ability to identify situations within their organizational history which they consider to have caused some overt harm, they should not be in a position to argue that the identities of 18, let alone 1300, informants ought to be revealed so that they can begin an investigation in an attempt to recover some supposed harm. To do otherwise would simply be to invert the burden of proof as regards informant disclosure and allow plaintiffs discovery upon mere speculation.* See United States v. Marshall, 526 F.2d 1349 (9th Cir. 1976). If the alleged manipulation or disruption never manifested itself in incidents which the plaintiffs can at least recognize as harmful, the challenged conduct could hardly be actionable. Moreover, to the extent that plaintiffs eschew reliance upon

* Plaintiffs' inability to identify such situations stands in marked contrast to those complaints containing concrete allegations with respect to informant activity which have withstood motions for dismissal. See Berlin Democratic Club v. Rumsfeld, 410 F. Supp. 144 (D.D.C. 1975), appeal pending, No. 76-1647; Harris v. Special Services Div. 349 F. Supp. 766 (S.D.N.Y. 1972) (Weinfeld, J.). To the extent plaintiffs seek to ground viable claims in harm from the FBI's dissemination of information gathered by informants that hardly requires disclosure of informants' identities.

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any specific instances of conduct and simply equate the presence of informants with manipulation or disruption,* there is no need to disclose informants' identities because the FBI admits that it had informants in SWP and YSA.

Even if plaintiffs had properly alleged a viable claim for informant activity based on state tort law, such a claim would nevertheless be barred by the exemption from FTCA liability in 28 U.S.C. § 2680(h) with respect to claims "arising out of . . . misrepresentation, deceit or interference with contract rights."

The exemptions for "deceit and misrepresentation" give particular force to the argument that plaintiffs' claims with respect to informant activity are not cognizable under the FTCA because such deception is at the heart of what the Supreme Court recognized as the "unfortunate necessity of undercover work." See Weatherford v. Bursey,

* See Plaintiffs' Answers No. 54(a) and 60 which indicate that this is the position that plaintiffs take (782a, 783a-786a).

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45 U.S.L.W. 4154, 4157 (1977). Hence, any claim with respect to an informant's participation in an organization is ultimately based upon the inherent deception necessary to maintain the informant as a source of information and is thus excluded by the exemptions for deceit and misrepresentation. Cf. Redmond v. United States, 518 F.2d 811 (7th Cir. 1975) where the misrepresentation exemption was held to bar recovery by a plaintiff who suffered financial injuries due to Government misrepresentations about the trustworthiness of a business associate. Moreover, "[e]ven if a claim purports to be grounded in theories other than misrepresentation the exception set out in 28 U.S.C. § 2680(h) would bar the action if deceit or misrepresentation were a factor relied upon to maintain a suit." Goodman v. United States, 324 F. Supp. 167 (M.D. Fla. 1971), aff'd. 455 F.2d 607 (5th Cir. 1971). Here allegations of deceit and misrepresentations form the very core of plaintiffs' claims.

Plaintiffs' claims are also defeated by the "interference with contract rights" exemption in § 2680(h).

Existing case law and sound policy make clear that this exemption encompasses not only the interference which occurs when breach of an existing contract has been induced but also that which takes place when future contracts are prevented or prospective advantage is negated.* Small v. United States, 333 F.2d 702 (3d Cir. 1964); Dupree v. United States, 264 F.2d 140 (3d Cir. 1959), reh. denied, 266 F.2d 373 (3d Cir. 1959), cert. denied, 361 U.S. 823 (1959); Taxay v. United States, 345 F. Supp. 1284 (D.D.C. 1972), aff'd, 487 F.2d 1214 (D.C. Cir. 1973); Duncan v. United States, 355 F. Supp. 1167 (D.D.C. 1973). Hence plaintiffs' claims for interference and prima facie tort come squarely within the purview of this exemption.

Finally, the legislative history with respect to 28 U.S.C. § 2680(h) reinforces the exclusion of plaintiffs' claims because it reflects a desire to preclude governmental liability for claims that could be inflated without challenge. See Hearings on S.2690 before a Subcommittee of the Committee on the Judiciary of the U.S. Senate, 76 Cong., 3d Sess., 39 (1940) in which it was explained that the exemption that would become 28 U.S.C. § 2680(h) was designed to preclude Government liability for torts "which would be difficult to

* This Court specifically reserved decision on that point in Myers & Myers, Inc. v. United States Postal Service, 527 F.2d 1252, 1260, n. 8 (2d Cir. 1975).

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make a defense against, and which are easily exaggerated." Accordingly, it would serve no rational purpose for Congress to permit recovery for loss of prospective advantage, and at the same time exempt recovery for inducing breach of contract where a plaintiff's expectancy is far more certain and less easily exaggerated than in situations, as here, involving highly speculative allegations with respect to loss of prospective advantage. Nor would it have made sense for Congress to exempt claims for misrepresentation and deceit yet allow recovery for vague allegations of manipulation or disruption by informants, which could only have been a product of these exempted categories of conduct. That Congress wanted to continue the exemption for torts involving such speculative damages is given further support by the fact that in 1974 when Congress did cut back on the scope of 28 U.S.C. § 2680(h) concerning torts by law enforcement officers, it nevertheless left intact the exemptions for interference with contract rights, deceit and misrepresentation. See 28 U.S.C. § 2680(h) as amended by Pub.L. 93-253, § 2, 88 Stat. 50 (1974).

b. Plaintiffs Have No Valid Claim
for Trespass or Conversion

As another basis for disclosure, the District Court referred to the torts of trespass and conversion and stated that there were indications that some informants had committed such torts by the "removal of private documents for production to the FBI," though the District Court did

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not state which informant files contained these indications. The District Court, however, did make clear that as concerns these 18 informants there was not "anything that we could call a burglary or an unauthorized entry of any kind" (105a, 109a). To the extent that an informant merely passes on to the FBI documents which are given to him for his own use, such as handouts, leaflets or copies of minutes that may be given to the membership, trespass or conversion is precluded almost by definition since the plaintiff organizations have given up any right to possess or control the materials distributed.* See Restatement (Second) of Torts §§216-217; 222A(1) (1964). An examination of the informant files, moreover, reveals that this practice constituted the bulk of informant activity with respect to the furnishing of documents.

The Government has admitted that informants provided the FBI with copies of documents to which the informants had been given access as members, officers or employees of the SWP or YSA.** As indicated in the informant

* Similarly there could be no conversion with respect to documents that the SWP or YSA had consigned to the trash since such property has been abandoned.

** Of the 18 informants, 14 were members. The remaining four, however, also provided copies of documents to which they had access, by virtue of their occupation or relationship with the plaintiffs (109a). See Affidavit of Syd Stapleton sworn to February 3, 1977 at ¶10 which admits that all members of SWP and YSA "have access to and are expected to read written communications from the national offices of those organizations" (1025a).

files informants either copied the documents themselves at the SWP or YSA premises and then furnished these copies to the FBI or else brought the documents to the FBI for copying and then returned them to the SWP or YSA.

These actions simply do not constitute either trespass or conversion. The leading case with respect to the scope of these two torts in this context is Pearson v. Dodd, 410 F.2d 701 (D.C. Cir. 1969) (Wright, J.), cert. denied, 395 U.S. 947 (1969). That action was a suit for damages by Senator Thomas Dodd against columnist Drew Pearson and his assistant Jack Anderson. According to the undisputed facts, former employees of Dodd, acting over a two month period, engaged in the unauthorized removal of letters and records from Senator Dodd's office, in some instances with the cooperation of members of Dodd's staff. The former employees removed the documents at night and returned them before the start of business the following day. In the interim the ex-employees copied the documents and transmitted the copies to Anderson "who was aware of the manner in which the copies had been obtained." 410 F.2d

at 703. As a result, Pearson published a series of articles based on information gleaned from the copied documents.

Reversing the District Court's grant of summary judgment upholding plaintiff's claim for conversion, the Court of Appeals held that there was no conversion of the documents because the plaintiff "was clearly not substantially deprived of his use of them."* 410 F.2d at 707. Similarly here plaintiffs were not deprived of the use of their documents since the documents were either returned after a brief removal for copying or were copied on plaintiffs' premises.

Moreover, unlike the situation in Pearson,** many, if not most, instances of copying by informants in this case took place with respect to documents which informants themselves were authorized to have in their control. Furthermore, SWP and YSA in legal form are unincorporated associations and thus own property only through their members who would be joint tenants with respect to the property of the organizations. Hence, member informants would have an ownership interest in the property of the plaintiff organ-

* See W.L. Prosser Torts § 15, at 85-87 (4th ed. 1971), and Illinois Minerals Co. v. McCarthy, 318 Ill. App. 423, 48 N.E. 2d 424 (1943), which held that an employee's copying of certain papers of his employer and his subsequent sale of the copied information was not actionable as conversion.

** The opinion of the District Court in Pearson refers to the uncontroverted facts as establishing that "individuals ... without authority entered the plaintiff's office [and] rifled his files ..." 279 F.Supp. 101, 104 (D.D.C. 1968).

izations equal that of any other member* and, short of physical destruction, could not as a matter of law commit conversion by the use of organizational property.**

As to the tort of trespass, Pearson is also dispositive since it holds that no trespass was committed because no damage had been done to the property in question. 410 F.2d at 707. See also 1F Harper and F. James, The Law of Torts § 2.36 (1956). Again, no such physical harm has been shown here and, therefore there can be no valid claim for trespass.

Pearson is also instructive for the present action because it rejects a theory of misappropriation of protected information,*** as an alternative ground to sustain the District Court's decision. Pearson makes clear that this tort is limited to such proprietary information as

* See Bradley v. O'Hare, 11 App. Div. 2d 15, 28, 202 N.Y.S. 2d 141, 153 (1960).

** Pearson clearly suggests the need for such a threshold analysis of ownership by pointing out the failure of the parties to brief whether Senator Dodd had a property right in files paid for by the United States. 410 F.2d at 706.

*** The Pearson Court chose to treat this theory under the rubric of conversion though it is clear that traditionally conversion will lie only as to tangible property and not such intangible items as information. See, e.g., Thompson v. Mobil Producing Co., 163 F. Supp. 402 (D. Mont. 1958); 1 F. Harper & F. James, supra, § 2.13, n.25.

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business or trade secrets which were not involved in Pearson and certainly are not involved here.* See Restatement (First) of Torts §§ 757-759 (1939). As in Pearson, the present case involves no misappropriation of scientific, literary, or confidential business information.

3. Plaintiffs' Claims With Respect to Informants Are Barred by the Applicable Statute of Limitations

The instant case presents that rare situation where a plaintiff's own pleadings conclusively demonstrate that certain of his claims are barred by the applicable statute of limitations. Here plaintiffs' claims with respect to informants are barred by their failure to comply with 28 U.S.C. § 2401(b) which provides in relevant part:

"A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues." (emphasis added).

Since plaintiffs first filed their tort claims against the Government based on informant activity in October 1976,** any claims accruing before October 1974 are

* Indeed, Judge Griesa did not rely upon a theory of misappropriation of information in his summary of conduct that might be actionable. Even if plaintiffs wanted to raise this contention, that would certainly not require disclosure of informants' identities, but rather a listing of all documents obtained by the FBI, as called for by plaintiffs' informant interrogatories.

** Plaintiffs first asserted tort liability against the United States based on informant activity in May 1976 by their first amended complaint in this case. That complaint was defective, however, because of plaintiffs' failure to file an administration tort claim based on informant activity as required by 28 U.S.C. § 2401(b). The appropriate administrative claim was filed in October 1976 (1234a).

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time barred.* Plaintiffs argued below that the statute was tolled until their discovery of their claims, which, they allege, occurred in or after December, 1974. This assertion, however, founders on the fact that their original complaint, filed on July 18, 1973, alleged that informants were used to harm SWP and YSA.** Plaintiffs' complaint therefore established that their claim accrued no later than July 1973, over three years before they filed their administrative claim. Simply put the test is "whether the plaintiff[s] should have had reason to believe or suspect wrongdoing." Hammond v. United States, 388 F.Supp. 928, 934 (E.D.N.Y. 1975) (emphasis added). Plaintiffs' original Complaint filed on July 18, 1973 reveals that plaintiffs were aware

* At the outset it must be noted that Section 2401(b) is not an ordinary statute of limitations. The failure to meet its requirements results in a lack of subject matter jurisdiction because § 2401(b) goes to the conditional waiver of sovereign immunity under the FTCA. Soriano v. United States, 352 U.S. 270, 276 (1957); Ashley v. United States, 413 F.2d 490, 492 (9th Cir. 1969); Hammond v. United States, 388 F. Supp. 928, 930-931 (E.D.N.Y. 1975); Lomax v. United States, 155 F. Supp. 354, 357 (E.D. Pa. 1957). The law is also clear that the burden of proof was upon plaintiffs to show that their claims were not barred by the statute of limitations. See Smith v. United States, 239 F. Supp. 152, 154 (D. Md. 1965); DeGroot v. United States, 384 F. Supp. 1178 (D. Iowa 1974).

** Plaintiffs first filed an administrative tort claim July, 1975, but that did not relate to informant activity (1234a).

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of the basic elements of the informant claims that they now assert. That complaint charged that the FBI used informants to harm the YSA and SWP as part of its alleged conspiracy against their First Amendment rights. That 1973 complaint stated:

On many occasions FBI agents attempted to induce members and did induce supporters of SWP to become government agents for the purposes of spying upon other members and of interfering with lawful campaigning and organizing (410a).

In addition, George Novack, a member of SWP since its inception, testified at his deposition in this case that it was a matter of "common knowledge and belief" to infer from the mere presence of informants in SWP and YSA that the informants have taken actions which "influenced the organization in injurious ways" (599a). Of course, as SWP's 1976 presidential candidate Peter Camejo testified at his deposition plaintiffs knew, well before July, 1973 that there were FBI informants in SWP and YSA (552a). This evidence coupled with plaintiffs' act of pursuing a legal remedy for these alleged wrongs, by filing a complaint in July, 1973, "establishes an awareness of injury and the suspicion in

the injured party that it was due to a wrongful act of another". Similarly, in Hammond v. United States, 388 F.Supp. 928, 934 (E.D.N.Y. 1975), the prior filing of a complaint alleging the subject activities commenced the running of the statute of limitations. See Tinkoff v. United States, 211 F.2d 890 (7th Cir. 1954).

Once plaintiffs knew about the allegedly tortious activity, they could not delay filing their claim. As the Second Circuit has expressed this basic rule of law:

This is not to say that one who knows he has suffered damage . . . may postpone bringing an action until the full extent of that damage is ascertained. . .

Toal v. United States, 438 F.2d 222, 225 (2d Cir. 1971). See Portis v. United States, 483 F.2d 670, 672 (4th Cir. 1973); Ashley v. United States, 413 F.2d 490, 493 (9th Cir. 1969). See also Suckow Borax Mines Consol. v. Borax Consolidated, 185 F.2d 196 (9th Cir. 1950), cert. denied, 340 U.S. 943 (1951); Winkelman v. Blyth & Co., Inc., 518 F.2d 530 (9th Cir. 1975), cert. denied, 423 U.S. 929 (1975).

A close analogy to the instant case arose in Japanese War Notes Claim Ass'n. v. United States, 373 F.2d 356, 359 (Ct. Cl. 1967), cert. denied, 389 U.S. 971 (1967), which was a suit for recovery of damages against the United States for its use of counterfeit money to disrupt the

Filipino economy, and to support U.S. intelligence agents and the resistance movement. The Government moved to dismiss the complaint as barred by the six-year statute of limitations and in granting the motion the Court of Claims concluded:

"With regard to the counterfeit currency, . . . [plaintiff] asserts that the defendant withheld information and that it was not possible for it to know of the counterfeiting until 1964. Once the statute of limitations has been tolled, it is not necessary that plaintiff obtain a thorough understanding of all the facts to halt the suspension. Defendant is not required to wait until plaintiff has started substantiating its claims by the discovery of evidence. Once plaintiff is on inquiry that it has a potential claim, the statute can start to run . . ." (emphasis added).

B. The Public Interest in Confidentiality Outweighs Plaintiff's Supposed Need for the Informants' Identities

As this brief has demonstrated plaintiffs' claims for injunctive relief and damages are without merit and, accordingly cannot justify the disclosure which the District Court has ordered. To the extent that plaintiffs might have valid claims for injunctive relief, disclosure of informants' identities is not required to litigate such a claim since the essential facts relating to informant coverage necessary to formulate whatever injunctive relief, if any, is appropriate have already been developed. Furthermore, even if

a court were able to find that plaintiffs may have valid claims for damages under a creative tort theory which plaintiffs have not yet unveiled, such a conclusion would not automatically mean that plaintiffs' interest in disclosure would outweigh the public interest in confidentiality. To order disclosure of informants' identities merely because plaintiffs can articulate a viable theory for which such information may be helpful, before exhausting all alternative methods for developing the relevant information, would, in effect, accord no weight at all to the public interest in confidentiality. Moreover, it would make the confidentiality of federal informants depend upon developments in the "substantive law of the several states, among which divergencies are notorious," Feres v. United States, 340 U.S. 135, 142 (1950).*

The difficulty with such a result is especially pronounced under the facts of this case since plaintiffs' principal claim with respect to informant activity, namely manipulation and disruption, would become actionable only by

* One pertinent example of such divergence is that in some states conversion is a "strict liability" tort. See, e.g., United States v. Topeka Livestock Auction, Inc., 392 F. Supp. 1001 (N.D. Ind 1976), applying Indiana law. Hence, any claim for conversion arising in such a state would not even be actionable under the FTCA because 28 U.S.C. §1346(b) permits recovery only for "negligent or wrongful" acts and does not waive sovereign immunity for strict liability. Laird v. Nelms, 406 U.S. 797 (1972). Cf. Gardiner Manufacturing Co. v. United States, 479 F.2d 39 (9th Cir. 1973).

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a significant expansion of existing tort law, which might occur in some states but not in others. Requiring disclosure on this basis, however, would force anyone who contemplated assisting federal law enforcement officers to make extremely subtle calculations about what might be or might not be considered tortious. Naturally, the result of any such rule would be to discourage assistance as Black v. Sheraton, 47 F.R.D. 263, 271 (D.D.C. 1969) (Sirica, J.) recognized in rejecting a plaintiff's demand for the name of an informant who had assisted the FBI in an electronic surveillance of the plaintiff:

Plaintiff believes that he would discourage only tortious assistance but in effect the necessity for the informer to prejudge his assistance would generally discourage cooperation.

If the Government's guarantee of confidentiality for informants' identities is to retain any validity, disclosure of an informant's identity should not be considered, at the very least, until after it has been determined that the informant's conduct transgressed boundaries that federal law would reasonably expect him to recognize. Though the Supreme Court and the lower federal courts have not defined precise boundaries for permissible conduct by informants, the 18 informants certainly have not transgressed existing boundaries. As the District Court pointed out, the 18

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files do not disclose a "burglary or other unauthorized entry" by informants (105a, 109a-110a). Rather, these informants have simply supplied the Government with information and documents obtained by virtue of their relationship with SWP and YSA.

That the plaintiff organizations have suffered from misplaced confidence in the commitment of these informants to the revolutionary goals of SWP and YSA does not render an informant's activity constitutionally impermissible. United States v. White, 401 U.S. 745 (1971); Hoffa v. United States, 385 U.S. 293 (1966), Lewis v. United States, 385 U.S. 206 (1966); As White holds:

However strongly a defendant may trust an apparent colleague, his expectations in this respect are not protected by the Fourth Amendment when it turns out that the colleague is a government agent regularly communicating with the authorities. 401 U.S. at 749.

Cf. United States v. Russell, 411 U.S. 423, 435 (1973). The case law to date has also held that an informant may, without transgressing recognized boundaries, give law enforcement officers personal property made available to him by his associates. Thus, United States v. Mendoza, 473 F.2d 692 (5th Cir. 1972) upholds a search by an informant of an automobile entrusted to him by his colleagues. As United States v. Haden, 397 F.2d 460, 464-465 (7th Cir. 1968), cert. denied, 396 U.S. 1027 (1970) holds, one is not

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...protected from the consequences of error if he places trust in the silence, duplicity or complicity of a government agent or informer. Neither is he protected from the consequences of error if he places physical evidence in plain view of government agents.

Indeed, since White, supra, holds that an informant who is equipped with a recording device may monitor conversations to which he has access, it should follow that an informant could permissibly provide law enforcement officers with copies of documents to which he is given access, for, as Mendoza, supra, points out "... most people would place a greater premium on the sanctity of their conversations with their supposed friends." 473 F.2d at 696.

Furthermore, the Supreme Court has recently recognized in Weatherford v. Bursey, 45 U.S.L.W. 415 (1977) that an informant may even participate in meetings between a defendant and his attorney without overstepping constitutional boundaries if his presence is necessary to preserve his undercover status. Similarly an informant should have been able to participate in the activities of the SWP or YSA since that would obviously have been necessary to preserve his confidentiality. At the very least Weatherford suggests that the boundaries on informant conduct in this regard are simply not so firm as to render informants' participation an act that places their confidentiality beyond protection.

Even if the District Court properly could conclude that one or more of the 18 informants overstepped recognized boundaries of permissible conduct, the procedure it followed is nevertheless defective since no such determination was made as to each of the informants. Instead, the District Court's order requiring disclosure of all 18 files was, at best, apparently based upon information or activities reflected in only a few. However, if such an approach were sanctioned, it is unlikely that anyone, knowing that the continued confidentiality of his relationship would depend not on his own actions but upon those of other informants or agents, would rationally decide to assist the Government. At the very least, then, a determination under the Roviaro balancing test as to whether disclosure of an informant's identity is warranted should be made only on an informant by informant basis.

Finally, the District Court has ordered disclosure notwithstanding plaintiffs' failure to explore, let alone exhaust, possible alternatives which would safeguard the public interest in confidentiality and, at the same time, provide them with evidence for whatever valid claims they might have. Once a valid claim of privilege has been asserted, as here, the question facing a district court is not whether a party seeking discovery will be deprived of his right to develop his own evidence in the manner that he chooses to develop it, (50a) since any evidentiary privilege infringes on that right; rather, the question becomes whether relevant evidence in support of the party's valid claims can be developed in a manner that does not infringe on the privilege. In that regard plaintiffs have made little effort to develop evidence they claim to need through alternative means. Indeed, they have not even taken the depositions of all those informants whose identities are known to them, nor have they attempted to depose FBI agents to whom the 18 informants reported or propound additional interrogatories or notices to admit with respect to informant activity. Additionally, plaintiffs have made no attempt at all to particularize their damages or the alleged manipulation and disruption and, instead, have relied upon broad allegations to support their sweeping discovery demands.

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IV. THE DISTRICT COURT'S ORDER SERVES NO
VALID PURPOSE AND IS WHOLLY IMPROPER

The District Court has reviewed the 18 informant files for those activities purportedly at issue in this case and has concluded that the files do not reveal any instances of burglary or unauthorized entry by informants (105a, 109a-110a). The District Court has also noted that there are only three references to disruptive activity in the files (110a). At a minimum, then, even accepting the District Court's tentative observations on the legal issues in this case plaintiffs have absolutely no valid claim to review 15 informant files which the District Court itself has concluded are free from any evidence relating to plaintiffs' damage claims for manipulation or disruption.*

Even plaintiffs' counsel has stated that his review of the informant files will serve no purpose. Indeed, plaintiffs have consistently taken the position that only the release of the identities of all informants to their clients for use in a "field investigation" will accomplish their discovery goals. Thus, on May 5, 1977, plaintiffs' counsel argued that disruptive activity by informants could not be proven by reviewing FBI files, FBI file summaries, or FBI interrogatory answers but only through disclosure of

* Similarly, while the District Court did not mention the number of files which allegedly reflect trespass or conversion, it would seem that the substance of this activity could be imparted to plaintiffs counsel in a manner not requiring disclosure of the informants' identities (99a-110a).

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the names of all 1300 informants (1251a-1252a).^{*} In his written response of May 23, 1977, to the District Court's proposal for disclosure to counsel, Mr. Boudin reiterated that only disclosure of informants' names to his clients would suffice, since plaintiffs' lawyers did not have their client's "expertise" and "knowledge of SWP groups throughout the country" (1137a).

Accordingly, not only does disclosure of the informant files provide no benefit to plaintiffs' counsel, it will not assist the District Court in its analysis of the informant question. The District Court is presently in possession of the files and summaries, with respect to the 18 informants. By their own admission, plaintiffs' counsel possess no special knowledge relevant to the informant activity and thus would not contribute to the District Court's knowledge. Accordingly, the District Court's procedure will not provide any more data for use in making a determination on whether, as the District Court apparently contemplates, certain files "should be revealed in public

* An excellent example of how useless such a procedure can be involves the 6 voluminous files produced to the plaintiffs during August, 1976. From this mass of informant information plaintiffs were only able to make one very attenuated argument as to how an FBI informant had purportedly "disrupted" the organization by taking a political position inconsistent with the "party line" (1134a).

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discovery" (50a). Therefore, the District Court, after in camera review of the informant files and summaries, should have proceeded to that determination with respect to each informant file rather than adopting an intermediate procedure whose only practical effect is a wholesale abrogation of the privilege.

Since the District Court's order effectively abrogates the informant's privilege pending any decision on whether informants' identities should be publicly disclosed, it is wholly improper. It is simply pointless to claim a privilege if the procedure for passing on the claim violates the privilege. As the Supreme Court observed in United States v. Nixon, 418 U.S. 683, 714 (1974):

It is elementary that in camera inspection of evidence is always a procedure calling for scrupulous protection against any release or publication of material not found by the court, at that stage probably admissible in evidence and relevant to the issues of the trial for which it is sought.

Moreover, as the Supreme Court* has held in the area of the privilege for state secrets:

The Court itself must determine whether the circumstances are appropriate for the claim of privilege, and yet do so without forcing a disclosure of the very thing the privilege is designed to protect. United States v. Reynolds, 345 U.S. 1, 8 (1953) (emphasis added).

See also Kenyatta v. Kelly, 375 F. Supp. 1175, 1176 (E.D. Pa. 1974).**

* The cases are uniform in upholding in camera examination by the Court alone as the proper procedure with respect to privileged material not rising to the level of state secrets and, indeed, when controversy over in camera procedure arises this is in the context of whether privileged material will be produced to the Court for its review. See e.g., Smith v. Schlesinger, 513 F.2d 462, 477-78 (D.C. Cir. 1975); Weisberg v. Department of Justice, 489 F.2d 1195, 1202 (D.C. Cir. 1973), cert. denied, 416 U.S. 993 (1974); Committee for Nuclear Responsibility v. Seaborg, 463 F.2d 788, 792-94 (D.C. 1971); Machin v. Zuckert, 316 F.2d 336, 340-41 (D.C. Cir. 1962), cert. denied, 375 U.S. 896 (1963).

** The proposed Rule 510(a) of the Federal Rules of Evidence as promulgated by the Supreme Court, but not enacted by Congress, adopts this view by the procedure which it establishes for determining a claim of informant privilege which excludes opposing counsel from knowledge of the informant's identity prior to a resolution of the claim. See J. Weinstein and M. Berger Evidence ¶510[03] at 510-24.

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CONCLUSION

For all of the above reasons, the United States of America, respectfully requests that this Court grant its petition for a writ of mandamus or, in the alternative, reverse the order of the District Court entered June 7, 1977.

Dated: New York, New York

July 20 , 1977

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